

IN THE SUPREME COURT OF OHIO

Jean A. Anderson	:	On Appeal from the Erie County
	:	Court of Appeals,
Appellant,	:	Sixth Appellate District
	:	-----
v.	:	Court of Appeals Case No. E-10-0040
	:	-----
City of Vermilion c/o Brian Huff,	:	Supreme Court Case No. 12-0943
Finance Director	:	
	:	
Appellee.	:	
	:	

MERIT BRIEF OF APPELLANT JEAN A. ANDERSON

Andrew D. Bemer, Esq. (#0015281)
 Seeley, Savidge, Ebert & Gourash Co., LPA
 26600 Detroit Road
 Cleveland, Ohio 44145
 (216) 566-8200
 Fax No. (216) 566-0213
 adbemer@sseg-law.com

COUNSEL FOR RELATOR-APPELLANT, JEAN A. ANDERSON

Shawn W. Maestle (#0063779)
 Timothy Obringer (#0055999)
 Weston Hurd LLP
 The Tower at Erieview
 1301 East 9th Street, Suite 1900
 Cleveland, Ohio 44114
 (216) 241-6602
 Fax No. (216) 621-8369
 SMAestle@westonhurd.com
 TObringer@westonhurd.com

COUNSEL FOR RESPONDENT-APPELLEE, City of Vermilion

RECEIVED

JUL 16 2012

CLERK OF COURT
SUPREME COURT OF OHIO

FILED

JUL 16 2012

CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

TABLE OF AUTHORITIESiii

I. NATURE OF THE CASE 1

II. STATEMENT OF FACTS 2

III. PROPOSITION OF LAW AND SUPPORTING ARGUMENT 6

PROPOSITION OF LAW NO. 1: The Lower Court Erred in Denying Summary Judgment to Relator; as Mandated by R.C. 149.43(B), the Court Should Have Ordered a Redaction of Privileged Attorney-Client Communications From Respondent’s Fee Billing Statements and Further Ordered a Disclosure of the Non-Excepted Portions of the Statements as Public Records 6

A. Standard of Review 6

B. Action in Mandamus to Secure Public Records 7

C. Purpose of the Public Records Act 8

 1. Government Transparency 8

 2. Public Records Custodian Has Burden Of Showing Exemptions 9

D. R.C. 149.43(B)(1) Directs the Court to Redact Excepted Information, and Release the Remaining Information Contained in the Requested Public Record..... 10

E. Asserting the Attorney-Client Privilege or Work Product Does Not Satisfy Respondent’s Burden to Show That the Non-Privileged Portion of the Attorney Fee Billings Were Excepted From Public Disclosure 12

 1. Law and Facts Required to Create The Attorney-Client Privilege 12

 2. Applying the Privilege to Public Records 13

F. Financial Expenditures by a Public Body Must Always be Subject to Disclosure, Including Statements for Legal Services, With Redaction of Privileged Material 14

G.	The Appellate Opinions in <i>Bodiker, Alley</i> and <i>Sun Newspapers</i> Provide Precedent for Redaction of Privileged material and Disclosure of Non-Privileged Attorney fee Statements Under R.C. 149.43(B)(1).....	15
H.	Limitations in the Supreme Court’s Opinion in <i>Dawson v. Bloom-Carroll</i>	19
	PROPOSITION OF LAW NO. 2: The Lower Court Also Erred by not Awarding Statutory Compensatory Damages and Attorney Fees to Relator	22
A.	Relator is Entitled to Statutory Damages and Reasonable Attorney Fees	22
IV.	CONCLUSION	24
	CERTIFICATE OF SERVICE	26
	APPENDIX	vii

TABLE OF AUTHORITIES

Abbuhl v. Orange Village, 2003-Ohio-4662, 8th Dist. No. 82203, 2003-Ohio-4662 15

Cranford v. Cleveland, 103 Ohio St.3d 196, 2004-Ohio-4884 23

Dorrian v. Scioto Conservancy District, 27 Ohio St.2d 102 (1978) 10

Dresher v. Burt, 75 Ohio St.3d 280, 292-293 (1996) 6

Grand Jury Investigation, 723 F. 2d 447, (6th Cir. 1983)..... 15

Grand Jury Subpoenas v. Anderson 906 F. 2d 1485 (10th Cir. 1990)..... 15

Horn 976 F.2d 1314 (9th Cir., 1992)..... 6

Horton v. Harwick Chem. Corp., 73 Ohio St.3d 679 (1995)..... 6

Hughes v. Langston, 853 So.2d 1237 (Miss. 2003)..... 22

Moskovitz v. Mount Sinai Med. Center, 69 Ohio St.3d 638 (1994)..... 12

Muehrcke v. Housel, 2005-Ohio-5440, 2005 WL 2593551 8th Dist. No. 85643, 85644, 2005-Ohio-5440..... 15

RW Sidley, Inc. v. Limbach, 66 Ohio St.3d 256, 1993-Ohio-116..... 11

Shell v. Drew & Ward Co. LPA, 178 Ohio App.3d 163, 2008-Ohio-4474 (1st Dist.) 15

State ex rel. ACLU of Ohio Inc. v. Cuyahoga County Board of Commissioners, 128 Ohio St.3d 256, 2011-Ohio-625 11

State ex rel. Alley v. Couchois, 2nd Dist. Case 94-CA-30, 1995 WL 559973
September 20, 1995 15, 16, 17, 22, 24

State ex rel. Bardwell v. Rocky River Police Department, 8th Dist. No. 81236, 2009-Ohio-727..... 8, 22

State ex rel. Beacon Journal Publishing Co. v. Bodiker, 134 Ohio App.3d 415 (10th Dist. 1999)..... 15, 16, 17, 22, 24

State ex rel. Beacon Journal Publishing Co. v. University of Akron 64 Ohio St.2d 392, 398 (1980)..... 9, 14

State ex rel. Braxton v. Nichols Cuyahoga App. No. 93653-93655, 2010-Ohio-3193 24

<i>State ex rel. Calvary v. City of Upper Arlington</i> , 89 Ohio St.3d 229, 2000-Ohio-142	7
<i>State ex rel. Cleveland Police Patrolmen’s Association v. City of Cleveland</i> , 84 Ohio St.3d 310, 1999-Ohio-352	6
<i>State ex rel. Cincinnati Enquirer v. Jones-Kelley</i> 118 Ohio St.3d 81, 2008-Ohio-1770	9
<i>State ex rel. Cincinnati Enquirer v. Winkler</i> , 101 Ohio St. 3d 382, 2004-Ohio-1581	8
<i>State ex rel. Davila v. City of East Liverpool</i> , 7 th Dist. No 10-CO-16, 2011-Ohio-1347.....	6
<i>State ex rel. Dawson v. Bloom-Carroll Local School Dist.</i> , 131 Ohio St.10, 2011-Ohio-6009.....	1, 2, 12, 19, 20, 21, 23
<i>State ex rel. Dayton Newspapers, Inc. v. Dayton</i> , 45 Ohio St.2d 107 (1976)	9
<i>State ex rel. Dayton Newspapers, Inc. v. Rauch</i> 12 Ohio St.3d 100 (1984).....	9
<i>State ex rel. Dispatch Printing Co. v. Johnson</i> , 106 Ohio St. 3d 160, 2005-Ohio-4384.....	9
<i>State ex rel. Doe v. Smith</i> , 123-Ohio St.3d 44, 2009-Ohio-4149	23
<i>State ex rel. ESPN, Inc. v. Ohio State University</i> ,-- Ohio St. 3d--, 2012-Ohio-2690.....	8
<i>State ex rel. Evans v. City of Parma</i> , 8 th Dist. No. 81236, 2003-Ohio-1159.....	8
<i>State ex rel. Foster v. Evatt</i> , 144 Ohio St. 65 (1944).....	11
<i>State ex rel. Gannett Satellite Information Network v. Shirey</i> , 78 Ohio St.3d 400, 1997-Ohio-206.....	7
<i>State ex rel. James v. Ohio State Univ.</i> , 71 Ohio St.3d 245 (1994).....	8
<i>State ex rel. Keller v. Cox</i> , 85 Ohio St.3d 279, 1994-Ohio-264	8
<i>State ex rel. Klein v. Cuyahoga County Board of Elections</i> 102 Ohio App.3d 124 (8 th Dist. 1995).....	7
<i>State ex rel. Lanham v. Smith</i> , 112 Ohio St.3d 527, 2007-Ohio-609	8
<i>State ex rel. Leslie v. Ohio Housing Fin. Agency</i> , 105 Ohio St.3d 261, 2005-Ohio-1508...	13
<i>State ex re. Mahajan v. State Medical Board of Ohio</i> , 127 Ohio St.3d 497, 2010-Ohio-5995.....	8
<i>State ex rel. Master v. Cleveland</i> , 75 Ohio St.3d 23 (1996).....	12

<i>State ex rel. McGowan v. Cuyahoga Metro. Housing</i> , 78 Ohio St. 3d 518 (1997).....	7
<i>State ex rel. Minor v. Eshen</i> , 74 Ohio St.3d 134 (1995).....	7
<i>State ex rel. Morgan v. City of Lexington</i> , 112 Ohio St.3d 33, 2006-Ohio-6365.....	23
<i>State ex rel. Multimedia Inc. v. Whalen</i> , 51 Ohio St.3d 99 (1990).....	23
<i>State ex rel. Mun. Construction Equipment Operators Labor Counsel v. Cleveland</i> 8 th Dist. No. 94226, 2010-Ohio 2108	23
<i>State ex rel. National Broadcasting Co. v. Cleveland</i> 57 Ohio St.3d 77 (1991).....	12
<i>State ex rel. National Electrical Contractors Association v. Ohio Bureau of Employment Services</i> , 88 Ohio St.3d 577, 2000-Ohio-431	7
<i>State ex rel. Nix v. City of Cleveland</i> , 83 Ohio St.3d 379, 1998-Ohio-290.....	13, 21
<i>State ex rel. Plain Dealer Publishing Co. v. Krouse</i> 51 Ohio St.2d 1 (1977).....	9
<i>State ex rel. Repository v. Nova Behavioral Health, Inc.</i> , 112 Ohio St.3d 338, 2006-Ohio- (1992)	14
<i>State ex rel. Rogers v. Taft</i> , 64 Ohio St.3d 193 (1992).....	7
<i>State ex rel. Shisler v. OPERS</i> , 122 Ohio St.3d 148, 2009-Ohio-2522	11
<i>State ex rel. Sun Newspapers v. Westlake BOE</i> , 76 Ohio App.3d 170 (8 th Dist. 1991).....	15, 16, 18, 22, 24
<i>State ex rel. Taxpayers Coalition v. Lakewood</i> , 86 Ohio St.3d 385 (1999)	14, 21, 22
<i>State ex. rel. Thomas v. Ohio State University</i> , 71 Ohio St.3d 245, 1994-Ohio-261	13, 14
<i>State ex rel. Toledo Blade Co. v. Ohio Bureau of Workers' Compensation</i> , 106 Ohio St.3d 113, 2005-Ohio-6549	14
<i>State ex rel. Toledo Blade Co. v. Toledo-Lucas County Port Authority</i> , 121 Ohio St.3d 537, 2009-Ohio-1767.....	9, 13
<i>State ex rel. Toledo Blade Company v. University of Toledo Foundation</i> 65 Ohio St.3d 258 (1992).....	14
<i>State ex rel. Wadd v. Cleveland</i> , 81 Ohio St.3d 50 (1998).....	23

<i>State ex rel. Wallace v. State Med. Bd. of Ohio</i> , 89 Ohio St.3d 431 (2000).....	8
<i>State ex rel. WBNS, TV, Inc. v. Dues</i> , 101 Ohio St.3d 406, 2004-Ohio-1497	8
<i>State ex rel. Zuern v. Leis</i> , 56 Ohio St.3d 20 (1990)	9
<i>Swidler & Berlin v. U.S.</i> , 524 U.S. 399 (1998)	12
<i>Vought Industries, Inc. v. Tracy</i> , 72 Ohio St.3d 261, 1995-Ohio-18	11, 20
<i>Wheeling Steel Corp. v. Porterfield</i> , 24 Ohio St.2d 24 (1970).....	11
<i>Woodman v. City of Lakewood</i> , 44 Ohio App.3d 118 (8 th Dist. 1998).....	14

OTHER AUTHORITIES

R.C. 149.011(G)	8, 17
R.C. 149.43	2, 3, 8
R.C. 149.43(A)(1).....	3, 13
R.C. 149.43(B).....	6
R.C. 149.43(B)(1).....	9, 10, 11, 12, 15, 19, 20, 21, 24, 25
R.C. 149.43(C).....	22
R.C. 149.43(C)(1).....	7
R.C. 149.43(C)(ii)(c)	22
R.C. 149.43(C)(ii)(c)(i)	23
R.C. 149.43(C)(ii)(c)(ii)	23

MEMORANDUM

I. NATURE OF THE CASE

This action for writ of mandamus originated in the Sixth District Court of Appeals, Erie County Case No. E-10-040, filed on September 14, 2010 by Relator Jean A. Anderson, requesting certain public records from Respondent City of Vermilion in the nature of attorney fee billings for attorney services rendered to the City by Attorney Kenneth Stumphauzer, Stumphauzer & O'Toole, and Marcie & Butler, for the months of January, February, March and April 2010. In response to the Court's issuance of an alternative writ, Respondent filed its Answer on November 4, 2010, upon receiving an unopposed extension to plead. Relator filed her motion for summary judgment on April 13, 2011. Respondent's brief in opposition to summary judgment was filed on June 3, 2011, and reciprocal leaves were granted to file a reply in support of summary judgment and sur-reply in opposition. Relator filed a motion for *In Camera* review of the requested public records on February 15, 2012; Respondent filed its brief in opposition thereto on February 27, 2012. The Court granted Relator's motion for *In Camera* review on March 6, 2012, ordering copies of the requested documents to be filed under seal by March 16, 2012, to which Respondent complied.

On April 25, 2012 the Appellate Court issued its Decision and Judgment Entry denying Relator's motion for summary judgment and summarily dismissing the action in mandamus. Citing the Supreme Court decision in *State ex rel. Dawson v. Bloom-Carroll Local School Dist.*, 131 Ohio St.10, 2011-Ohio-6009, the Appellate Court held that the subject itemized billing records are protected by the attorney-client privilege and exempt from disclosure under the Public Records Act. (Decision, ¶ 11) The Appellate Court

noted that in *Dawson*, the Relator was provided with summaries of the invoices in issue, but that it “is well established that a public office is not required to generate a new document in response to a public records request”, the Court declined to do so. (Decision, ¶12) Relator filed a motion for reconsideration on May 2, 2012, which the court was not obligated to rule on, as this was not an appeal but an original action in the Court of Appeals.

Relator filed her Notice of Appeal on June 5, 2012, the Supreme Court filed its order to certify the record with the Appellate Court on June 5, 2012, and the record was filed with the Supreme Court on June 14, 2012.

II. STATEMENT OF FACTS

Relator is the former mayor of the City of Vermilion, serving that community during the term of January 1, 2006 through December 31, 2009. (Anderson Aff. ¶1)¹ Relator was aware that legal fees were expended in February 2010 in excess of \$27,000.00, the billing had been unwittingly provided to her. (Id., Ex A). Annualized, attorney fees would be far in excess of legal costs during her administration. On or about May 14, 2010 Relator submitted a public records request in accordance with Ohio Revised Code §149.43 to Law Director Kenneth S. Stumphauzer of the City of Vermilion Ohio, requesting copies of a letter submitted by Barb Brady to the Ohio Ethics Commission and the Commission’s response thereto. (Id., Ex B). There was no response from Stumphauzer or any other representative of the City of Vermilion to Relator’s

¹ The evidentiary record is presented in part through the affidavits and exhibits of Relator Jean A. Anderson and Attorney Andrew D. Bemer which were identified and attached to Relator’s motion for summary judgment. Further reference to these affidavits shall be cited as “Anderson Aff. ___” and “Bemer Aff. ___”.

public records request of May 14, 2010. Another request was submitted for the same documents on May 25, 2010. (Anderson Aff ¶2 Ex C).

Also on May 25, 2010, Relator personally delivered to City of Vermilion Finance Director Brian Huff a public records request pursuant to R.C. §149.43, for: copies of all checks paid to the law firms of Stumphauzer and O'Toole and Marcie & Butler for January, February, March and April 2010; copies of all itemized billing statements received from attorneys Kenneth Stumphauzer, Stumphauzer and O'Toole and Marcie & Butler, for January, February, March and April 2010; and copies of all itemized billing statements/all bills received from engineers Lynn Miggins and KS Associates for the months of January, February, March and April 2010. Marcie & Butler was a holdover law firm from Relator's administration, providing legal services for litigation that extended into the next mayoral term. Kenneth Stumphauzer had been appointed law director in the 2010 mayoral term. (Anderson Aff. ¶5, Ex E). Relator requested to be notified when the copies would be ready for pick-up, the amount due for the copies and provided an email address and cell phone number. (Anderson Aff ¶3, Ex D).

Eventually, the City provided copies of the checks requested, and the billing statements received from Lynn Miggins and KS Associates; however, the itemized billing statements for attorney services rendered to the City by Kenneth Stumphauzer, Stumphauzer & O'Toole and Marcie & Butler were never provided.

Law Director Stumphauzer responded via email on May 25, 2010, acknowledging receipt of both the May 14 and May 25, 2010 letters, stating:

This is to further acknowledge that you consider certain documents referenced in your letters as public records. I suggest you review Ohio Revised Code §149.43(A)(1).

(Anderson Aff ¶6, Ex F). Relator responded to Stumphauzer by email of May 26, 2010, again requesting copies of the documents requested in letter form of May 14 and May 25, 2010. (Anderson Aff ¶7, Ex F). In response to Relator's May 26, 2010 email, Stumphauzer responded via email on May 27 with:

The documents you requested are not "public records" because they are not kept by the City of Vermilion. With respect to the ethics opinion, that document may be kept by the Ohio Ethics Commission, and if so, you may want to secure a copy from that office. I believe I have exceeded any requirements under the Ohio Public Records Law with respect to your records request. Therefore, I do not intend to further communicate on this matter.

(Anderson Aff ¶8, Ex F).

Merely submitting copies of cancelled checks did not satisfy Relator's requests of May 14 and May 25, 2010; the Respondent had failed to fulfill the aforementioned public records requests for attorney fee billing statements. (Anderson Aff ¶9-10). Indeed, Respondent had not complied with the law in its failure to release all non-exempt portions of the records requested. (Id.) The information contained in the documents requested by Relator would allow the public to scrutinize the expenditure of public funds and provide an accounting, thereby allowing the public the benefit of determining whether its elected representatives properly utilize taxpayer funds. (Anderson Aff ¶10). Additionally, the public is entitled to know what legal matters, if any, the City is engaged in, the time expended on legal services, and the costs incurred by the City for said legal services. (Id.)

In June 2010, Relator retained the law firm of Seeley, Savidge, Ebert & Gourash Co., LPA for the purpose of pursuing her public records request of May 14 and May 25, 2010. (Anderson Aff ¶11; Bemer Aff ¶1). Various letters had been exchanged between

legal representatives of the City of Vermilion and the law firm of Seeley, Savidge, Ebert & Gourash Co., LPA concerning the public records requests of Ms. Anderson as follows: a letter submitted to Law Director Ken Stumphauzer of the City of Vermilion by Gary A. Ebert on June 21, 2010; a response letter from Attorney Abraham Lieberman of the law firm of Stumphauzer & O'Toole dated June 29, 2010; a sur response letter from Attorney Bemer to Attorney Lieberman dated August 12, 2010; and a sur response from Attorney Lieberman to Attorney Bemer on August 23, 2010. (Bemer Aff ¶2, Ex G, H, I and J).

Neither the City of Vermilion nor any of its representatives has provided to Seeley, Savidge, Ebert & Gourash Co., LPA the non-exempted records, nor any copies of redacted, exempt information contained in the public records requested by Ms. Anderson. (Bemer Aff ¶3). In his letter of June 29, 2010 (Bemer Aff, Ex H) Attorney Lieberman cited cases in support of the existence of an attorney-client privilege, but the cases cited did not support the denial of the financial billings which reference legal services rendered to the City of Vermilion by Attorney Stumphauzer, the law firm of Stumphauzer & O'Toole, or Marcie & Butler. (Bemer Aff ¶4).

Ohio's Public Records Act mandates that the actions by the City of Vermilion and its representatives denying the public records requested by Ms. Anderson warrant statutory compensatory damages and an award of the attorney fees incurred by Ms. Anderson for the legal services rendered by Relator's law firm in the pursuit of the public documents requested. (Anderson Aff ¶12). Relator has incurred attorney fees for legal services rendered by Seeley, Savidge, Ebert & Gourash, Co., LPA in the pursuit of the public records requested from Respondent and the mandamus action necessitated by Respondent's failure to disclose said records in the sum of \$12,473.29, which amount

continues to accrue as a result of the appeal to this Court. (Anderson Aff ¶12). The hourly rate of \$200.00 must be considered reasonable according to established case law and the directive of Rule 1.5 of the Ohio Rules of Professional Conduct. (Bemer Aff ¶5)

III. PROPOSITION OF LAW AND SUPPORTING ARGUMENT

PROPOSITION OF LAW NO. 1: The Lower Court Erred in Denying Summary Judgment to Relator; as Mandated by R.C. 149.43(B), the Court Should Have Ordered a Redaction of Privileged Attorney-Client Communications From Respondent's Fee Billing Statements and Further Ordered a Disclosure of the Non-Excepted Portions of the Statements as Public Records.

A. Standard of Review.

The trial court's denial of summary judgment is reviewed *de novo*. *State ex rel. Davila v. City of East Liverpool*, 7th Dist. No 10-CO-16, 2011-Ohio-1347. Pursuant to Civ. R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp.*, 73 Ohio St.3d 679 (1995), paragraph three of the syllabus. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293 (1996). If the moving party meets its initial burden of production, the nonmoving party bears a reciprocal burden to produce evidence on any issue for which that party bears the burden of proof at trial. *Id.* at 293.

Additionally, the Supreme Court has plenary authority in extraordinary writ cases, as if the matter had originally been filed in the Supreme Court. *State ex rel. Cleveland Police Patrolmen's Association v. City of Cleveland*, 84 Ohio St.3d 310, 1999-Ohio-352.

In this instance, this Court's plenary authority provides the ability to address the merits of the writ case without the need to remand the matter to the court of appeals upon a finding of error. *State ex rel. National Electrical Contractors Association v. Ohio Bureau of Employment Services*, 88 Ohio St.3d 577, 2000-Ohio-431, citing *State ex rel. Minor v. Eshen*, 74 Ohio St.3d 134 (1995).

B. Action in Mandamus to Secure Public Records.

A writ of mandamus shall be issued when a relator can demonstrate that he possesses a clear legal right to the relief requested, the respondent possesses a clear legal duty to perform the requested act, and the relator possess no plain and adequate remedy in the ordinary course of the law. *State ex rel. Rogers v. Taft*, 64 Ohio St.3d 193 (1992); *State ex rel. Klein v. Cuyahoga County Board of Elections*, 102 Ohio App.3d 124 (8th Dist. 1995). A mandamus action to obtain an order upon a public office responsible for the production of public records, together with a request for the payment of court costs and reasonable attorneys' fees, is specifically denominated as the proper course of action under Ohio Revised Code §149.43(C)(1). It is further recognized that in a mandamus action to secure public records, the relator need not demonstrate that he has no adequate remedy in the ordinary course of the law. *State ex rel. McGowan v. Cuyahoga Metro. Housing*, 78 Ohio St. 3d 518 (1997).

It is recognized that a writ shall not issue if the respondent has mooted the public disclosure issue by compliance with the public records request subsequent to court filing. *State ex rel. Calvary v. City of Upper Arlington*, 89 Ohio St.3d 229, 2000-Ohio-142; *State ex rel. Gannett Satellite Information Network v. Shirey*, 78 Ohio St.3d 400, 1997-Ohio-206; *State ex rel. Evans v. City of Parma*, 8th Dist. No. 81236, 2003-Ohio-1159;

State ex rel. Bardwell v. Rocky River Police Department, 8th Dist. No. 91022, 2009-Ohio-727. Moreover, a city has no duty to create or provide access to non-existent public records. *State ex rel. Lanham v. Smith*, 112 Ohio St.3d 527, 2007-Ohio-609; *Bardwell*, *supra* at ¶22.

C. Purpose of the Public Records Act.

1. Government Transparency.

It is recognized that the purpose of Ohio's Public Records Act, R.C. 149.43, is to expose government activity to public scrutiny in order to enhance the democratic process. *State ex rel. Cincinnati Enquirer v. Winkler*, 101 Ohio St. 3d 382, 2004-Ohio-1581. The Act serves a laudable purpose by insuring that government functions are not conducted behind a shroud of secrecy. *State ex rel. ESPN, Inc. v. Ohio State University*,-- Ohio St. 3d--, 2012-Ohio-2690, *citing State ex rel. Wallace v. State Med. Bd. of Ohio*, 89 Ohio St.3d 431, 438 (2000). While acknowledging the fundamental policy of promoting open government, a balance must be utilized between the public's right to know how a public entity functions and the burden or potential harm which may occur by disclosure. *State ex rel. James v. Ohio State Univ.*, 71 Ohio St.3d 245 (1994); *State ex rel. Keller v. Cox*, 85 Ohio St.3d 279, 1994-Ohio-264. That balance has been provided by the General Assembly by recognizing competing concerns and providing for certain exemptions from the release of public records. *State ex re. Mahajan v. State Medical Board of Ohio*, 127 Ohio St.3d 497, 2010-Ohio-5995, *citing State ex rel. WBNS, TV, Inc. v. Dues*, 101 Ohio St.3d 406, 2004-Ohio-1497.

The information requested must document the organization, functions, policies, decisions, procedures, operations, or other activities of the public agency. R.C.

149.011(G); *State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St. 3d 160, 2005-Ohio-4384. R.C. 149.43(B)(1) provides that the public office or person who is responsible for public records shall produce the records requested within a reasonable time, subject to records that contain exempt information. Any such exempt documentation shall be redacted, which in turn constitutes a denial of a request to inspect such records.

2. Public Records Custodian Has Burden Of Showing Exemptions.

The burden of establishing that a record is exempt from being exposed to public inspection falls upon the public office asserting the exemption. *State ex rel. Zuern v. Leis*, 56 Ohio St.3d 20 (1990). Exceptions to disclosure must be strictly construed against the custodian of the records. *State ex rel. Dayton Newspapers, Inc. v. Rauch*, 12 Ohio St.3d 100 (1984); *State ex rel. Plain Dealer Publishing Co. v. Krouse*, 51 Ohio St.2d 1 (1977). Any doubt should be resolved in favor of public disclosure of the requested records. *Dayton Newspapers, Inc. v. Dayton*, 45 Ohio St.2d 107 (1976). Indeed, the public records custodian does not meet his burden if he has not proven that the requested records fall squarely within an exception. *State ex rel. Toledo Blade Co. v. Toledo-Lucas County Port Authority*, 121 Ohio St.3d 537, 2009-Ohio-1767; *State ex rel. Cincinnati Enquirer v. Jones-Kelley*, 118 Ohio St.3d 81, 2008-Ohio-1770. It has been determined that the language utilized by the General Assembly in the Ohio public records law is intended to “guard against these exceptions swallowing up the rule which makes public records available.” *State ex rel. Beacon Journal Publishing Co. v. University of Akron*, 64 Ohio St.2d 392, 398 (1980).

D. R.C. 149.43(B)(1) Directs the Court to Redact Excepted Information, and Release the Remaining Information Contained in the Requested Public Record.

There can be no doubt that the Sixth District Appellate bench erred in failing to order a redaction of any excepted information from the attorney fee billing statements which had been requested, and in further failing to order the remaining statements to be released. Section 149.43(B)(1) states the following:

Upon request and subject to division (B)(8) of this section, all public records responsive to the request **shall** be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Subject to division (B)(8) of this section, upon request, a public office or person responsible for public records **shall** make copies of the requested public record available at cost and within a reasonable period of time. If a public record contains information that is exempt from the duty to permit public inspection or to copy the public record, the public office or the person responsible for the public record **shall** make available all of the information within the public record that is not exempt. When making that public record available for public inspection or copying that public record, the public office or the person responsible for the public record **shall** notify the requester of any redaction or make the redaction plainly visible. A redaction shall be deemed a denial of a request to inspect or copy the redacted information, except if the federal or state law authorizes or requires a public office to make the redaction. (emphasis added.)

There is no mistake that the General Assembly intended the provisions of Subsection (B)(1) to be mandatory rather than permissive. This Court has held that when a statute provides for the use “shall”, compliance with the commands of that statute is mandatory. *Dorrian v. Scioto Conservancy District*, 27 Ohio St.2d 102 (1978). The *Dorrian* Court stated:

The rule has been stated frequently and clearly: “In statutory construction, the word “may” shall be construed as permissive and the word “shall” shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that they receive a construction other than their ordinary usage.

27 Ohio St.2d at paragraph one of syllabus. Legislative intent is determined by reading the words and phrases of a statute in context, and construing them in accordance with the rules of grammar and common usage. *State ex rel. ACLU of Ohio Inc. v. Cuyahoga County Board of Commissioners*, 128 Ohio St.3d 256, 2011-Ohio-625, citing *State ex rel. Shisler v. OPERS*, 122 Ohio St.3d 148, 2009-Ohio-2522. Indeed, as the language used in §149.43(B)(1) is clear, it is to be applied and not construed; there is no basis for judicial authority to modify, enlarge, supply, expand, or otherwise revise the provision of this statute to meet a novel situation. *Vought Industries, Inc. v. Tracy*, 72 Ohio St.3d 261, 1995-Ohio-18, citing *State ex rel. Foster v. Evatt*, 144 Ohio St. 65 (1944). This has been referred to as the “first rule of statutory construction”. *Vought, supra* at 265. Accordingly, as the Ohio General Assembly has selected the language for §149.43(B)(1), as well as for the entire Ohio Public Records Act, it is the court’s obligation to apply the statute as written. *RW Sidley, Inc. v. Limbach*, 66 Ohio St.3d 256, 1993-Ohio-116, citing *Wheeling Steel Corp. v. Porterfield*, 24 Ohio St.2d 24 (1970).

Indeed, the lower court failed to utilize the recognized rules of statutory construction in failing to order the release of the balance of the requested attorney fee billing statements upon the redaction of any privileged or otherwise excepted information. The mandatory provisions of §149.43(B)(1) cannot be ignored. Any narratives which include matters of attorney-client privilege are certainly to be redacted under this statute. However, the statute dictates that there is no legal basis through interpretation or application to simply bypass the clear mandate for release of the non-excepted attorney fee statement as a public record with the redactions noted. The case law from the appellate courts of Ohio demonstrates consensus, among those districts who

have addressed this matter, that information pertaining to the **attorney's name, the fee total, and the general matter** involved, is outside the attorney-client privilege and must be released. See *infra*. While this Honorable Court has addressed this specific question in *Dawson v. Bloom-Carroll Local School District, supra*, uncertainty was created by the Court in its opinion, as discussed below. It is therefore submitted that this court must direct a return to the recognition that §149.43(B)(1) mandates all records to be released with redaction of excepted information. This has long been the holding of this court:

[W]hen a governmental body asserts that public records are excepted from disclosure and such assertion is challenged, the court must make an individualized scrutiny of the records in question. If the court finds that these records contain excepted information, this information must be redacted and any remaining information must be released.” *State ex rel. Master v. Cleveland* (1996), 75 Ohio St.3d 23, 31, 661 N.E.2d 180, 186-187, quoting *State ex rel. Natl. Broadcasting Co., Inc. v. Cleveland* (1988), 38 Ohio St.3d 79, 526 N.E.2d 786, paragraph 4 of the syllabus.

E. Asserting the Attorney-Client Privilege or Work Product Does Not Satisfy Respondent's Burden to Show That the Non-Privileged Portion of the Attorney Fee Billings Were Excepted From Public Disclosure.

1. Law And Facts Required to Create the Attorney Client-Privilege.

Recognizing the subject attorney billings contained some information that could be considered confidential or privileged, that information is to be redacted from the production of the attorney fee billings. The lower court erred in not ordering Respondent to produce those billings with the redactions of presumably confidential information.

It is understood that the attorney-client privilege is readily available for the protection of confidences shared between an attorney and client. *Moskovitz v. Mount Sinai Med. Center* 69 Ohio St.3d 638 (1994). The attorney-client privilege is intended to encourage full and frank communication between an attorney and the client in order to promote both the observance of the law and the administration of justice. *Swidler &*

Berlin v. U.S., 524 U.S. 399 (1998). The privilege protects against the dissemination of any information obtained through the course of the confidential relationship. *State ex rel. Leslie v. Ohio Housing Fin. Agency*, 105 Ohio St.3d 261, 2005-Ohio-1508. Indeed, the privilege will be applied when legal advice of any kind is sought from an attorney in his capacity, and the client's confidential communication relates to that purpose. *Leslie, supra*. Legal advice may begin with a preliminary evaluation of a client's situation, as such communication may reflect the attorney's professional skills and judgments. *Toledo Blade, supra*. However, the legal advice or assistance that is sought, including any investigation by legal counsel, must be integral to the assistance offered the client. *Leslie, supra*. For example, an attorney's investigation into acts of improprieties required legal training and experience, as well as the knowledge of the law governing the public bodies and policies, resulting in the ensuing investigative report being privileged. *Toledo Blade, supra*.²

2. Applying the Privilege to Public Records.

The attorney client privilege also applies to public or government clients, and any legal advice provided to such a client is exempted from disclosure under R.C. 149.43(A)(1); the release of such records is protected by state statute as well as legal precedent. *State ex. rel. Thomas v. Ohio State University* 71 Ohio St.3d 245, 1994-Ohio-261; *State ex rel. Nix v. City of Cleveland*, 83 Ohio St.3d 379, 1998-Ohio-290 (communications made by and between the city law department attorneys and city

² In finding that an investigative report that was prepared by counsel to be privileged, the Supreme Court concluded that the investigation and all communications included in the report were related to the rendition of legal services. The Supreme Court found that the factual investigation conducted by the attorney was incidental and related to the legal advice for which the attorneys were hired, to wit: the question of misconduct by the port authority president.

employees concerning preliminary conferences are privileged.) The confidential nature of the relationship of a governmental body with its legal counsel includes records that were prepared in reasonable anticipation of litigation or “trial preparation”. *University of Akron, supra*. Documents comprised of privileged communications between client and attorney meet the test of exemption from public disclosure. *Thomas, supra; Woodman v. City of Lakewood*, 44 Ohio App.3d 118 (8th Dist. 1998).

F. Financial Expenditures by a Public Body Must Always be Subject to Disclosure, Including Statements for Legal Services, With Redaction of Privileged Material.

The expenditure of public funds must always be considered the ultimate concern of the public in general. This concept includes the expenditure of funds for the public employee payroll (*State ex rel. Taxpayers Coalition v. Lakewood*, 86 Ohio St.3d 385 (1999)); or to determine how the government is investing public funds; (*State ex rel. Toledo Blade Co. v. Ohio Bureau of Workers’ Compensation*, 106 Ohio St.3d 113, 2005-Ohio-6549); or to review the activity of a government agency who is directly receiving funds through the solicitation of gift giving (*State ex rel. Toledo Blade Company v. University of Toledo Foundation*, 65 Ohio St.3d 258 (1992)).

It cannot be disputed that the records of the attorney fees billings are of significant interest to the public in general, as they constitute a disbursement of public funds generated from tax payer money. Whether the government is receiving the best legal services and the best legal rate available must always be considered a significant public concern. *State ex rel. Repository v. Nova Behavioral Health, Inc.*, 112 Ohio St.3d 338, 2006-Ohio-6713.

The general rule is that fee arrangements and attorney billings are not normally part of professional consultation and are therefore not considered privileged materials. *State ex rel. Beacon Journal Publishing Co. v. Bodiker*, 134 Ohio App.3d 415 (10th Dist. 1999); *Muehrcke v. Housel*, 8th Dist. No. 85643, 85644, 2005-Ohio-5440; *Abbuhl v. Orange Village*, 8th Dist. No. 82203, 2003-Ohio-4662; *State ex rel. Alley v. Couchois*, 2nd Dist. No. 94-CA-30, 1995 WL 559973 September 20, 1995; *State ex rel. Sun Newspapers v. Westlake BOE*, 76 Ohio App.3d 170 (8th Dist. 1991); *Shell v. Drew & Ward Co. LPA*, 178 Ohio App.3d 163, 2008-Ohio-4474 (1st Dist.) This principle is followed by the federal judiciary, even in discrete situations concerning criminal investigations. In re *Grand Jury Subpoenas v. Anderson* 906 F. 2d 1485 (10th Cir. 1990); in re *Grand Jury Investigation*, 723 F. 2d 447 (6th Cir. 1983); see also, Attorney-Client Privilege: State Law Ohio §6:17 by Stephen J. Gerber, 2010.

In addressing public records requests, Ohio appellate courts have recognized that narrative portions of legal advice on fee billings may be redacted from public records, but other portions of billing records, such as dates on which work was billed, the name of the attorney performing the work, and the nature of the general matter, have no protection as privileged information and must be released. *Bodiker, supra*; *Alley supra*; *Sun Newspapers, supra*.

G. The Appellate Opinions in *Bodiker*, *Alley* and *Sun Newspapers* Provide Precedent for Redaction of Privileged Material and Disclosure of Non-Privileged Attorney Fee Statements Under R.C. 149.43(B)(1).

It must be recognized that a public records request for attorney fee billing statements under the Ohio Public Records Act is a distinct departure from the discovery of attorney billings in non-public record litigation. Certain appellate districts in Ohio

(Second, Eighth and Tenth) have been consistent in recognizing a balance must be maintained between the public's right to access public records, compared with the confidential and privileged nature of attorney-client communications. It is submitted that the opinions in *Bodiker*, *Alley* and *Sun Newspapers* be reviewed as guiding precedent in addressing the matter at hand.

In *Bodiker*, *supra* the Beacon Journal newspaper requested documents from the public defender's office computer database reflecting the hours logged by individual attorneys, the timesheets completed by those attorneys, and contracts reflecting expenditures for outside experts in the defense of a particular defendant named Berry. The respondent public defender presented the same arguments as Respondent has made in the instant matter, i.e. attorney-client privilege, trial preparation records, and attorney work product. The Tenth District Appellate Court addressed each and every one of these arguments, recognizing the respondent's burden of demonstrating that the release of the records would reveal attorney/client communications, or special trial techniques developed through legal thought processes and personal preparation, with no consideration given to any empty claims that the release of the requested materials might or could reveal privileged information. The appellate court presented its opinion as follows:

Respondent's record-keeping activities, however, including recording attorney timesheets for efficiency purposes, entering those time records into a computer data base, and memorializing contractual agreements with private parties, relate only tangentially, if at all, to the public defenders' exercise of professional judgment on behalf of the indigent client in the actual criminal proceeding.

134 Ohio App.3d at 423. The court did provide the respondent with the opportunity to address any matters which were averred to be confidential communications with the following directive:

To the extent that the records at issue reflect more than time spent and fees charged and include confidential communications between Berry and his attorneys, the materials may be reviewed *in camera* by this court to determine which sections must be excised pursuant to the attorney-client privilege. Respondent is obligated to note specifically those documents that may contain privileged information. **However, the remaining information in those records not covered by an exception must be released.**

Id. at 425. (emphasis added) The court found that the timesheets, database and contracts at issue were public records under the former version of R.C. 149.011(G) (formerly 129.11(G)). After addressing the attorney-client privilege argument, the court then drew its attention to the argument that the records were trial preparation records, in concluding:

The factual information Relator's seek does not bear on the public defender's exercise of professional judgment on behalf of the indigent client. **Timesheets and billing records generally can be categorized as "routine office records" that fall outside the definition of trial preparation records".**

Id. at 427. (emphasis added). In summary, the Tenth District granted the writ of mandamus to compel the release of timesheets, computer database, and contracts which demonstrated the time and public funds expended in the representation of Mr. Berry.

In *Alley, supra*, a school board was requested to provide copies of invoices from the attorney who had been retained to conduct an investigation leading up to the termination of a school employee. An ancillary report had been prepared on behalf of the attorney by an outside consultant, and that report was deemed by the court to come under the attorney-client privilege and not subject to release. The school board on its own volition had released the attorney fee statements which had been generated for the

attorney's services leading up to the termination process, and the board had redacted narrative portions of those attorney billings. The Second District confirmed the lower court's conclusion that narrative portions of the attorney bills are protected by the attorney client privilege, and that the redaction of those narrative portions of the fee statements was proper. It is noteworthy that the school board recognized that there was no attorney-client privilege in any of the matters that did not contain narrative portions of the billings, as the communications that come under the attorney-client umbrella as privileged material are limited to those matters of attorney advice, thought-processes and legal analysis.

In *Sun Newspapers, supra*, a board of education was requested to release records reflecting the amount of attorney fees paid in connection with a lawsuit involving a party named Crandall. Upon appeal to the Eighth District, the appellate court issued the following order:

As a consequence, we order respondent to make all records which include information regarding attorney fees incurred due to the Crandall litigation available to relator. Respondent may, however, redact from attorney fees statements which have been submitted under seal:

1. all information regarding matters other than the Crandall litigation.
2. the narrative portion of entries relating to the Crandall litigation except the word "Crandall."

Respondent is, of course, free to provide relator with any supplemental information--*e.g.*, attorney fee schedules, hourly rates, etc.--which may facilitate the interpretation of the attorney's statements and an understanding of what portion of the total fee during any period arose from the Crandall litigation.

Indeed, the Sixth District failed to note the legal analyses employed by the Second, Eighth and Tenth Districts in their respective publication of clear, concise opinions which properly addressed the redaction/release mandate of §149.43(B)(1).

H. Limitations in the Supreme Court's Opinion in *Dawson v. Bloom-Carroll*.

In a matter of first impression to Ohio's High Court, the decision in *Dawson, supra*, has arguably created uncertainty concerning a public body's responsibility to release attorney fee billings which the public body maintains or keeps as a public record. Because the Bloom-Carroll School District had provided to the relator summaries of the invoices, including the attorney's name, the fee total and the general matter involved, it was judicially determined that such a creation of summaries satisfied the mandates of §149.43(B)(1), and the actual attorney fee invoices with redaction were not ordered to be disclosed. The *Dawson* Court made the following finding:

The withheld records are either covered by the attorney-client privilege or so inextricably intertwined with privileged materials as to also be exempt from disclosure. Therefore, the school district properly responded to Dawson's request for itemized invoices of law firms providing legal services to the district in matters involving Dawson and her children by providing her with summaries of the invoices including the attorney's name, the fee total, and the general matter involved. No further access to the detailed narratives contained in the itemized billing statements was warranted.

(131 Ohio St.3d at 16.)

In *Dawson*, it is recognized that the Supreme Court honored the intent and mission of Ohio's Public Records Act in encouraging and, mandating transparency and scrutiny of government activity, including those of a financial nature concerning the expenditure of tax payer resources through attorney fees. Notwithstanding, the *Dawson* Court failed to apply the mandates of subsection (B)(1) by ordering the release of the

attorney fee billings with the proper redaction of narrative statements which were confidential under the attorney-client privilege. While the *Dawson* decision as it applied to those particular parties was “no harm no foul”, the Supreme Court’s decision in *Dawson* was an explicit modification of the specific language mandated by the General Assembly in subsection (B)(1). The *Dawson* Court in effect side-stepped the basic rules of statutory construction, in that the mandate of subsection(B)(1) in its use of “shall” provides no basis for judicial authority to modify, enlarge, supply, expand, or otherwise revise the provision of this statute. *Vought Industries, Inc., supra*. It is submitted that this Court may clarify and limit *Dawson* to the situation where the release of identical information satisfies the directives of §149.43(B)(1).

From a practical standpoint, it is difficult to conceive any attorney fee billing statement that would contain narrative matters of attorney-client privilege that were so “intertwined” with the date, attorney’s name, general matter and fee to be paid, such that the narrative statements could not be redacted and the attorney fee billing statements be released according to the clear mandate of subsection (B)(1). The matter at hand provides this Honorable Court the opportunity to apply §149.43(B)(1) as written without judicial revision contrary to the legislative intent.

The Sixth District Court of Appeals erred in its adoption of the *Dawson* opinion in this regard, in that the Sixth District failed to note the distinction in the *Dawson* decision of providing the summary of attorney fee billings as a substitute to the redaction of narrative attorney-client communications in the actual billings. The lower court clearly erred in not following the legislative mandate of §149.43(B)(1), in failing to order the release of non-excepted portions of the attorney fee billing statements, i.e., the attorney’s

name, fee total and general matter involved. In effect, the Sixth District's decision also failed to recognize that the purpose of the Public Records Act is to provide record access and scrutiny to government activity.

Moreover, this appeal is not an argument challenging the time honored attorney-client privilege, nor a request that the privileged communications be balanced against the public's right to maintain transparency in government actions. In its review of the Sixth District's decision, this High Court has the opportunity to clarify its opinion in *Dawson*, and thereby serve both interests: the statutory obligations under §149.43(B)(1) are to redact excepted narrative portions of fee statements, and to order release of the balance of the statements as public records. In that regard, the privileged communications are protected by simply redacting any narrative portions of the fee billings, and in turn, the public's right to know what legal issues confront the City and the legal costs involved, are also protected.

The case precedence cited by this High Court in *Dawson* is also puzzling. The *Dawson* court cited *Taxpayers Coalition v. Lakewood, supra*, for the proposition that the government body "had no duty to provide access to records related to attorney fees that...were covered by attorney-client privilege." 86 Ohio St.3d at 392. The *Taxpayers Coalition* opinion included this gratuitous statement as *dicta*, with a citation to *Nix, supra*, as all of the attorney fee statements had been voluntarily released to the relator subsequent to the commencement of litigation; at issue was access to employee's contribution to Ohio's deferred compensation program, and the redaction of social security numbers and compensation amounts. In *Nix*, the facts involved wiretapping litigation and the notes of a city attorney concerning conversations with other employees;

as in *Taxpayer Coalition*, copies of attorney billings had been voluntarily released with a recognition that they were not privileged materials.³ Noteworthy is the Court's cite to *Alley, supra* in recognizing the narrative portions of attorney fee statements represent communications from an attorney to the client and are therefore protected. Unfortunately, the Court did not discuss the well written opinion in *Bodiker, supra*, nor review the specific order of redaction and release as public records the remaining portions of the attorney fee statements in *Sun Newspapers, supra*.

PROPOSITION OF LAW NO. 2: The Lower Court Also Erred by not Awarding Statutory Compensatory Damages and Attorney Fees to Relator.

A. Relator is Entitled to Statutory Damages and Reasonable Attorney Fees.

R.C. 149.43(C) directs the court to provide statutory damages, costs and attorney fees upon a showing that the public office or a responsible person for the requested public records failed to provide the public the requested records. Court costs and reasonable attorney fees shall be construed as remedial and not punitive. R.C. 149.43(C)(ii)(c). Statutory damages under R.C. 149.43(C) is intended to compensate for the injury arising from the lost use of the requested information. *Bardwell, supra*. Attorney fees shall include "reasonable fees incurred to produce proof of the reasonableness and the amount of the fees and to otherwise litigate entitlement to the fees." (*Id.*)

³ Moreover, the Supreme Court's reference to the Mississippi case of *Hughes v. Langston*, 853 So.2d 1237 (Miss. 2003) and the reference to *In re Horn* 976 F.2d 1314 (9th Cir., 1992) also have very little application; *Hughes* was not a public records case, but was a civil matter concerning improper judicial conduct and an investigation of fraud in tobacco litigation, without any reference to the proposition of redacting privileged material from fee bills. *Horn* concerned a federal grand jury investigation into attorney fee billings as a means of determining whether there existed a "last link" in a chain of evidence incriminating the client.

It is submitted that Respondent cannot contend that he has a reasonable basis to believe his failure to produce the records requested did not constitute a failure to comply with his statutory obligation, or that his conduct served the public policy which underlies the authority for his refusal to produce the records requested. R.C. 149.43(C)(ii)(c)(i) and (ii). Respondent cannot circumvent its responsibilities to release legal summaries by contending the summaries were not specifically requested; awareness, not perfection, is the context of the circumstances of a public records request and the reciprocal release of these records. *State ex rel. Morgan v. City of Lexington*, 112 Ohio St.3d 33, 2006-Ohio-6365. A lack of good faith must be found in this regard, supporting Relator's claim for attorney fees. *State ex rel. Multimedia Inc. v. Whalen*, 51 Ohio St.3d 99. (1990)⁴

Indeed, the public benefit which would be created by the release of the records in question is a factor for the court to consider in the reasonableness of the governments failure to comply with the public records request. *State ex rel. Wadd v. Cleveland*, 81 Ohio St.3d 50 (1998); *Cranford v. Cleveland*, 103 Ohio St.3d 196, 2004-Ohio-4884. There can be no dispute that the public is benefited by knowing how and why taxpayer funds have been expended on attorney fees.

It has been held that an attorney's hourly rate and pursuit of a mandamus action for the release of public records is considered reasonable when the rate is between \$225.00-\$265.00, even though \$250.00 per hour is considered at the very top of the acceptable range for legal services. *State ex rel. Doe v. Smith*, 123 Ohio St.3d 44, 2009-Ohio-4149; *State ex rel. Mun. Construction Equipment Operators Labor Counsel v.*

⁴ It has since been learned through the media that Respondent has and always has been in possession of summaries of the fee billings from Stumphauzer & O'Toole, but failed to reveal their existence produce these summaries akin to *Dawson*.

Cleveland 8th Dist. No. 94226, 2010-Ohio 2108 (finding \$265.00 per hour a reasonable rate), *see also*, *State ex rel. Braxton v. Nichols Cuyahoga* App. No. 93653-93655, 2010-Ohio-3193 (finding \$225.00 per hour a reasonable rate).

Relator has incurred attorney fees for legal services rendered by Seeley, Savidge, Ebert & Gourash, Co., LPA in the pursuit of the public records requested from Respondent and the mandamus action necessitated by Respondent's failure to produce said records. The fees prior to this Supreme Court appeal are in the sum of \$12,473.29, which amount continues to accrue. (Anderson Aff ¶12; Exhibit "K"). The hourly rate of \$200.00 must be considered reasonable according to established case law and the directive of Rule 1.5 of the Ohio Rules of Professional Conduct. Ohio's Public Records Act mandates that the actions by the City of Vermilion and its representatives in denying the public records requested by Ms. Anderson warrant statutory compensatory damages and an award of the attorney fees.

IV. CONCLUSION

~~The evidentiary record presented to the Sixth District Court of Appeals in both~~ affidavit and exhibit form demonstrates that Respondent failed in its statutory duty of disclosing public records to Relator as requested. The Lower Court failed to follow the precedent established by the Second, Eighth and Tenth Districts in *Alley*, *Sun Newspapers* and *Bodiker*; nor did the Court recognize the distinction of the summaries of attorney billings disclosed in *Dawson*. R.C. 149.43(B)(1) is clear as written: after privileged information is redacted, the non-expected information must be released.

The attorney fee billings that have been requested will provide transparency to the government operations of the City of Vermilion, and allow the public the right to

scrutinize the nature and extent of legal fees that are being incurred by the City. There is no doubt the taxpayers have a right to determine whether their government is being operated in a prudent fashion, or whether the City is paying excessively for the legal representation they receive.

The Lower Court must be found to have erred in denying summary judgment to Relator and failing to order release of the attorney fee billing statements as requested, subject to redaction according to R.C. 149.43(B)(1). Accordingly, Relator is entitled to her requested writ of mandamus which orders the Respondent City of Vermilion to turn over the public records requested, for her statutory damages and payment of the reasonable attorney fees incurred in the legal pursuit of her public records request and this appeal.

Respectfully submitted,
Andrew D. Bemer



Andrew D. Bemer

COUNSEL FOR RELATOR-APPELLANT,
JEAN A. ANDERSON

Certificate of Service

I certify that a copy of this Merit Brief was sent by ordinary U.S. mail to counsel for respondent-appellee, Shawn W. Maestle, Esq. and Timothy Obringer, Esq., Weston Hurd LLP, The Tower at Erieview, 1301 East 9th Street, Suite, 1900, Cleveland, Ohio 44114-1862 on July 13, 2012.



Andrew D. Bemer

COUNSEL FOR RELATOR-APPELLANT,
JEAN A. ANDERSON

APPENDIX

A – Notice of Appeal to the Supreme Court dated June 1, 2012.

B – Decision and Judgment of the Sixth District Court of Appeals dated April 25, 2012.

C – Statute §149.011

D – Statute §149.43

ORIGINAL

IN THE SUPREME COURT OF OHIO

Jean A. Anderson

Appellant,

v.

City of Vermilion c/o Brian Huff,
Finance Director

Appellee.

: On Appeal from the Erie County Court of
: Appeals,
: Sixth Appellate District

: Court of Appeals Case No. E-10-0040

: 12-0943

LUVADA S. WILSON
CLERK OF COURTS

2012 JUN -5 PM 3:05

FILED
COURT OF APPEALS
ERIE COUNTY, OHIO

NOTICE OF APPEAL OF APPELLANT JEAN A. ANDERSON

Andrew D. Bemer (0015281)
Seeley, Savidge, Ebert & Gourash Co., LPA
26600 Detroit Road
Cleveland, OH 44145-2397
adbemer@ssug-law.com
telephone: 216/566-8200
facsimile: 216/566-0213

COUNSEL FOR APPELLANT
JEAN A. ANDERSON

Shawn W. Maestle (0063779)
Timothy Obringier (0055999)
Weston Hurd LLP
The Tower at Erie view
1301 East 9th Street, Suite 1900
Cleveland, Ohio 44114
SMAestle@westonhurd.com
TObringier@westonherd.com
telephone: 216/241-6602
facsimile: 216/621-8369

COUNSEL FOR APPELLEE CITY OF
VERMILION C/O BRIAN HUFF
FINANCE DIRECTOR

RECEIVED
JUN 01 2012
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
JUN 01 2012
CLERK OF COURT
SUPREME COURT OF OHIO

Notice of Appeal of Appellant Jean A. Anderson

Appellant Jean A. Anderson hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Erie County Court of Appeals, Sixth Appellant District, entered in Court of Appeals Case No. E-10-0040 on April 25, 2012.

This case is an appeal of right, as the case originated in the Erie County Court of Appeals. A time-stamped copy of the Decision and Judgment is attached hereto.

Respectfully submitted,



Andrew D. Bemer (0015281)

COUNSEL FOR APPELLANT
JEAN A. ANDERSON

CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Appeal of Appellant Jean A. Anderson has been sent by ordinary U.S. mail, postage prepaid, to Shawn Maestle and Timothy Obringer, Weston Hurd, LLP, 1301 East 9th Street, Suite 1900, Cleveland, Ohio 44114, this 31 day of May, 2012.



Andrew D. Bemer, Esq. (#0015281)

FILED
COURT OF APPEALS
ERIE COUNTY, OHIO
2012 APR 25 PM 3:29
LYNDA S. WILSON
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio, ex rel. Jean A. Anderson

Court of Appeals No. E-10-040

Relator

v.

City of Vermilion, c/o Brian Huff,
Finance Director

DECISION AND JUDGMENT

Respondent

Decided:

APR 25 2012

Andrew D. Berner, for relator.

Shawn W. Maestle, Timothy R. Obringer and Jeffrey R. Lang, for respondent.

PIETRYKOWSKI, J.

{¶ 1} This matter is before the court as an original action in mandamus. Relator, Jean A. Anderson, seeks an order from this court directing respondent, the city of Vermilion, by and through its finance director, Brian Huff, to comply with her previous public records requests and make available all itemized billing statements for attorney

1.

J32/252
4-26-12
A A

FAXED

services rendered to the city of Vermilion by Kenneth Stumphauzer, Stumphauzer & O'Toole, and Marcie & Butler. In support of her petition, relator has filed a motion for summary judgment, which relator has opposed in its brief in opposition. The matter is now decisional.

{¶ 2} The undisputed facts of this case are as follows. On May 14, 2010, relator presented Kenneth S. Stumphauzer, the law director of the city of Vermilion, with a public records request pursuant to R.C. 149.43. In her request, relator asked for copies of a letter submitted by Barb Brady to the Ohio Ethics Commission ("OEC"), and the OEC's response thereto, which letter and response had been identified by Stumphauzer in a Vermilion City Council meeting on May 3, 2010. The letter and response allegedly referred to Vermilion's allowing Stumphauzer to hire his law firm, Stumphauzer, O'Toole, McLaughlin, McGlamery & Loughman Co., LPA ("Stumphauzer & O'Toole"), to do city business while Stumphauzer was an employee of Vermilion. Stumphauzer did not respond to the request and on May 25, 2010, relator resubmitted her request. In an email response, Stumphauzer denied that the information that she sought from him was a public record. Also on May 25, 2010, relator submitted a public records request to Brian Huff for (1) copies of all checks paid to the law firm of Stumphauzer & O'Toole and to Margaret O'Brian for the months of January, February, March and April 2010, (2) copies of all itemized billing statements received from Stumphauzer, Stumphauzer & O'Toole, and Marcie & Butler, another law firm, for the months of January, February, March and April 2010, and (3) copies of all itemized billing statements or bills received from

engineers Lynn Miggins and KS Associates for the months of January, February, March and April 2010.

{¶ 3} Eventually, relator obtained the documents regarding the OEC's ethics opinion from another source. In addition, respondent provided relator with copies of the checks requested and the billing statements from Lynn Miggins and KS Associates. Relator also obtained, although through a different source, a copy of a summary billing statement dated February 16, 2010, that Stumphauzer & O'Toole submitted to respondent for legal fees covering legal services rendered through February 15, 2010. To date, however, respondent refuses to provide relator with the itemized billing statements for attorney services rendered to the city of Vermilion by Kenneth Stumphauzer, Stumphauzer & O'Toole, and Marcie & Butler.

{¶ 4} "'Mandamus is the appropriate remedy to compel compliance with R.C. 149.43, Ohio's Public Records Act.'" *State ex rel. Striker v. Smith*, 129 Ohio St.3d 168, 2011-Ohio-2878, 950 N.E.2d 952, ¶ 21, quoting *State ex rel. Physicians Commt. for Responsible Medicine v. Ohio State Univ. Bd. of Trustees*, 108 Ohio St.3d 288, 2006-Ohio-903, 843 N.E.2d 174, ¶ 6; R.C. 149.43(C)(1). The Public Records Act implements the state's policy that "open government serves the public interest and our democratic system." *State ex rel. Dann v. Taft*, 109 Ohio St.3d 364, 2006-Ohio-1825, 848 N.E.2d 472, ¶ 20. "'Consistent with this policy, we construe R.C. 149.43 liberally in favor of broad access and resolve any doubt in favor of disclosure of public records.'" *State ex rel. Perrea v. Cincinnati Pub. Schools*, 123 Ohio St.3d 410, 2009-Ohio-4762, 916 N.E.2d

1049, ¶ 13, quoting *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686, ¶ 13.

{¶ 5} Generally to be entitled to the issuance of a writ of mandamus, the relator must demonstrate (1) a clear legal right to the relief prayed for, (2) a clear legal duty on the respondent's part to perform the act, and (3) that there exists no plain and adequate remedy in the ordinary course of law. *State ex rel. Master v. Cleveland*, 75 Ohio St.3d 23, 26-27, 661 N.E.2d 180 (1996); *State ex rel. Harris v. Rhodes*, 54 Ohio St.2d 41, 42, 374 N.E.2d 641 (1978). Where the allegation relates solely to a public records request, the Supreme Court has held that the requirement of the lack of an adequate legal remedy, as an element of a petition for writ of mandamus, does not apply. *State ex rel. Glasgow, supra*, at ¶ 12. When the release of a public record is challenged, it is the function of the courts to analyze the information to determine whether it is exempt from disclosure. See, *State ex rel. Natl. Broadcasting Co. v. Cleveland*, 38 Ohio St.3d 79, 85, 526 N.E.2d 786 (1988).

{¶ 6} Ohio's Public Records Act requires a public office or person responsible for public records to promptly disclose a public record unless the record falls within one of the clearly defined exceptions to the mandate of R.C. 149.43. As used in R.C. 149.43, a "public record" means "records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units * * *." R.C. 149.43(A)(1). Moreover, "records" include "any document, device, or item, regardless of physical form or characteristic, created or received by or coming under the jurisdiction of any public

office * * * which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.” R.C. 149.011(G). A “public office” includes “any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government.” R.C. 149.011(A). “Exceptions to disclosure under the Public Records Act * * * are strictly construed against the public-records custodian, and the custodian has the burden to establish the applicability of an exception. A custodian does not meet this burden if it has not proven that the requested records fall squarely within the exception.” *State ex rel. Cincinnati Enquirer v. Jones-Kelley*, 118 Ohio St.3d 81, 2008-Ohio-1770, 886 N.E.2d 206, paragraph two of the syllabus.

{¶ 7} Respondent asserts that the records at issue, the attorney fee statements and billings, are exempt from disclosure under R.C. 149.43 because they are protected by the attorney-client privilege and work product doctrine. In order to properly examine the issues before us, we ordered respondent to submit the unredacted copies of the records to the court for an in camera inspection. Respondent filed those records on March 16, 2012.

{¶ 8} R.C. 149.43(A)(1)(v) exempts from disclosure “[r]ecords the release of which is prohibited by state or federal law.” In *State ex rel. Dawson v. Bloom-Carroll Local School Dist.*, 131 Ohio St.3d 10, 2011-Ohio-6009, 959 N.E.2d 524, ¶ 27, the Supreme Court of Ohio clarified this exemption as it relates to the attorney-client privilege:

“The attorney-client privilege, which covers records of communications between attorneys and their government clients pertaining to the attorneys’ legal advice, is a state law prohibiting release of those records.” *State ex rel. Besser v. Ohio State Univ.* (2000), 87 Ohio St.3d 535, 542, 2000-Ohio-475, 721 N.E.2d 1044. In Ohio, the attorney-client privilege is governed both by statute, R.C. 2317.02(A), which provides a testimonial privilege, and by common law, which broadly protects against any dissemination of information obtained in the confidential attorney-client relationship. *State ex rel. Toledo Blade Co. v. Toledo-Lucas Cty. Port Auth.*, 121 Ohio St.3d 537, 2009-Ohio-1767, 905 N.E.2d 1221, ¶ 24.

{¶ 9} In *Dawson*, the relator, Dawson, had filed a petition for a writ of mandamus to compel the respondent, the school district, to provide her with access to itemized invoices of law firms who had provided legal services to the school district pertaining to Dawson and her children. Prior to filing her petition with the Supreme Court, Dawson had filed a public records request with the school district. While the school district provided Dawson with summaries of invoices which noted the attorney’s name, the invoice total and the matter involved, the school district refused to provide Dawson with the itemized invoices themselves. The school district asserted that the invoices contained confidential communications between the district and its attorneys and were therefore exempt from disclosure. The Supreme Court agreed and held that “[t]o the extent that narrative portions of attorney-fee statements are ‘descriptions of legal services performed

by counsel for a client,' they are protected by the attorney-client privilege because they 'represent communications from the attorney to the client about matters for which the attorney has been retained by the client.'" *Dawson, supra*, at ¶ 28, quoting *State ex rel. Alley v. Couchois*, 2d Dist. No. 94-CA-30, 1995 WL 559973, * 4 (Sept. 20, 1995). In reaching this conclusion, the court noted:

"While a simple invoice ordinarily is not privileged, itemized legal bills necessarily reveal confidential information and thus fall within the [attorney-client] privilege." *Hewes v. Langston* (Miss.2003), 853 So.2d 1237, ¶ 45. As a federal appellate court observed, "billing records describing the services performed for [the attorney's] clients and the time spent on those services, and any other attorney-client correspondence * * * may reveal the client's motivation for seeking legal representation, the nature of the services provided or contemplated, strategies to be employed in the event of litigation, and other confidential information exchanged during the course of the representation. * * * [A] demand for such documents constitutes 'an unjustified intrusion into the attorney-client relationship.'" *In re Horn* (C.A.9, 1992), 976 F.2d 1314, 1317-1318, quoting *In re Grand Jury Witness (Salas)* (C.A.9, 1982), 695 F.2d 359, 362.

{¶ 10} The court further held, however, that the school district properly responded to Dawson's request for the itemized invoices of law firms by providing her with summaries of the invoices, which included the attorney's name, the fee total, and the

general matter involved. Accordingly, that information does fall within the realm of matters that are subject to disclosure under the Public Records Act.

{¶ 11} In the case before us, the attorney fee statements and billings which respondent has submitted to us for an in camera inspection contain narrative descriptions of legal services performed by counsel for the city of Vermilion. The invoices submitted to the city by Marcie & Butler state the date, a description of the professional service rendered, the time spent on each service and the hourly rate, and the total amount due for each date listed. The invoices submitted to the city by Stumphauzer & O'Toole state under separate headings which identify the general matter or case involved, detailed descriptions of the professional services rendered, the time spent on those services and the legal fees associated with each matter. Consistent with *Dawson*, we must hold that the subject itemized billing records are protected by the attorney-client privilege and are therefore exempt from disclosure under the Public Records Act.

{¶ 12} Although as a general matter R.C. 149.43(A) "envisions an opportunity on the part of the public office to examine records prior to inspection in order to make appropriate redactions of exempt materials," *State ex rel. The Warren Newspapers, Inc. v. Hutson*, 70 Ohio St.3d 619, 623, 640 N.E.2d 174 (1994), the court in *Dawson* did not discuss redaction but, rather, exempted the entire record. We further note that while the respondent in *Dawson* provided the relator with summaries of the invoices at issue, it is well established that a public office is not required to generate a new document in

response to a public records request. *State ex rel. Nix v. Cleveland*, 83 Ohio St.3d 379, 382; 700 N.E.2d 12 (1998).

{¶ 13} Because the itemized billing statements for attorney services rendered to the city of Vermilion by Kenneth Stumphauzer, Stumphauzer & O'Toole, and Marcie & Butler are exempt from disclosure under the Public Records Act, there remains no genuine issue of material fact and respondent is entitled to judgment as a matter of law. Relator's motion for summary judgment is denied. Relator's action in mandamus is hereby ordered dismissed at relator's cost. The clerk is directed to serve all parties, within three days, a copy of this decision in a manner prescribed by Civ.R. 5(B).

WRIT DISMISSED.

Peter M. Handwork, J.

Mark L. Pietrykowski, J.

Thomas J. Osowik, J.
CONCUR.

Peter M. Handwork
JUDGE
Mark L. Pietrykowski
JUDGE
Thomas J. Osowik
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

I HEREBY CERTIFY THIS TO BE A TRUE COPY OF THE ORIGINAL FILED IN THIS OFFICE.

LUVADA S. WILSON, CLERK OF COURTS
Erie County, Ohio

By *Betty A. Martin*

FILED APPEALS
COURT OF APPEALS
ERIE COUNTY, OHIO
2012 APR 25 PM 3:29
LUVADA S. WILSON
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio, ex rel. Jean A. Anderson

Court of Appeals No. E-10-040

Relator

v.

City of Vermilion, c/o Brian Huff,
Finance Director

DECISION AND JUDGMENT

Respondent

Decided:

APR 25 2012

Andrew D. Berner, for relator.

Shawn W. Maestle, Timothy R. Obringer and Jeffrey R. Lang, for respondent.

PIETRYKOWSKI, J.

{¶ 1} This matter is before the court as an original action in mandamus. Relator, Jean A. Anderson, seeks an order from this court directing respondent, the city of Vermilion, by and through its finance director, Brian Huff, to comply with her previous public records requests and make available all itemized billing statements for attorney

1.

J32/252
4-26-12
C.A.

FAXED

services rendered to the city of Vermilion by Kenneth Stumphauzer, Stumphauzer & O'Toole, and Marcie & Butler. In support of her petition, relator has filed a motion for summary judgment, which relator has opposed in its brief in opposition. The matter is now decisional.

{¶ 2} The undisputed facts of this case are as follows. On May 14, 2010, relator presented Kenneth S. Stumphauzer, the law director of the city of Vermilion, with a public records request pursuant to R.C. 149.43. In her request, relator asked for copies of a letter submitted by Barb Brady to the Ohio Ethics Commission ("OEC"), and the OEC's response thereto, which letter and response had been identified by Stumphauzer in a Vermilion City Council meeting on May 3, 2010. The letter and response allegedly referred to Vermilion's allowing Stumphauzer to hire his law firm, Stumphauzer, O'Toole, McLaughlin, McGlamery & Loughman Co., LPA ("Stumphauzer & O'Toole"), to do city business while Stumphauzer was an employee of Vermilion. Stumphauzer did not respond to the request and on May 25, 2010, relator resubmitted her request. In an email response, Stumphauzer denied that the information that she sought from him was a public record. Also on May 25, 2010, relator submitted a public records request to Brian Huff for (1) copies of all checks paid to the law firm of Stumphauzer & O'Toole and to Margaret O'Brian for the months of January, February, March and April 2010, (2) copies of all itemized billing statements received from Stumphauzer, Stumphauzer & O'Toole, and Marcie & Butler, another law firm, for the months of January, February, March and April 2010, and (3) copies of all itemized billing statements or bills received from

engineers Lynn Miggins and KS Associates for the months of January, February, March and April 2010.

{¶ 3} Eventually, relator obtained the documents regarding the OEC's ethics opinion from another source. In addition, respondent provided relator with copies of the checks requested and the billing statements from Lynn Miggins and KS Associates. Relator also obtained, although through a different source, a copy of a summary billing statement dated February 16, 2010, that Stumphauzer & O'Toole submitted to respondent for legal fees covering legal services rendered through February 15, 2010. To date, however, respondent refuses to provide relator with the itemized billing statements for attorney services rendered to the city of Vermilion by Kenneth Stumphauzer, Stumphauzer & O'Toole, and Marcie & Butler.

{¶ 4} "Mandamus is the appropriate remedy to compel compliance with R.C. 149.43, Ohio's Public Records Act." *State ex rel. Striker v. Smith*, 129 Ohio St.3d 168, 2011-Ohio-2878, 950 N.E.2d 952, ¶ 21, quoting *State ex rel. Physicians Comm. for Responsible Medicine v. Ohio State Univ. Bd. of Trustees*, 108 Ohio St.3d 288, 2006-Ohio-903, 843 N.E.2d 174, ¶ 6; R.C. 149.43(C)(1). The Public Records Act implements the state's policy that "open government serves the public interest and our democratic system." *State ex rel. Dann v. Taft*, 109 Ohio St.3d 364, 2006-Ohio-1825, 848 N.E.2d 472, ¶ 20. "Consistent with this policy, we construe R.C. 149.43 liberally in favor of broad access and resolve any doubt in favor of disclosure of public records." *State ex rel. Perrea v. Cincinnati Pub. Schools*, 123 Ohio St.3d 410, 2009-Ohio-4762, 916 N.E.2d

1049, ¶ 13, quoting *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686, ¶ 13.

{¶ 5} Generally to be entitled to the issuance of a writ of mandamus, the relator must demonstrate (1) a clear legal right to the relief prayed for, (2) a clear legal duty on the respondent's part to perform the act, and (3) that there exists no plain and adequate remedy in the ordinary course of law. *State ex rel. Master v. Cleveland*, 75 Ohio St.3d 23, 26-27, 661 N.E.2d 180 (1996); *State ex rel. Harris v. Rhodes*, 54 Ohio St.2d 41, 42, 374 N.E.2d 641 (1978). Where the allegation relates solely to a public records request, the Supreme Court has held that the requirement of the lack of an adequate legal remedy, as an element of a petition for writ of mandamus, does not apply. *State ex rel. Glasgow, supra*, at ¶ 12. When the release of a public record is challenged, it is the function of the courts to analyze the information to determine whether it is exempt from disclosure. See, *State ex rel. Natl. Broadcasting Co. v. Cleveland*, 38 Ohio St.3d 79, 85, 526 N.E.2d 786 (1988).

{¶ 6} Ohio's Public Records Act requires a public office or person responsible for public records to promptly disclose a public record unless the record falls within one of the clearly defined exceptions to the mandate of R.C. 149.43. As used in R.C. 149.43, a "public record" means "records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units * * *." R.C. 149.43(A)(1). Moreover, "records" include "any document, device, or item, regardless of physical form or characteristic, created or received by or coming under the jurisdiction of any public

office * * * which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.” R.C. 149.011(G). A “public office” includes “any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government.” R.C. 149.011(A). “Exceptions to disclosure under the Public Records Act * * * are strictly construed against the public-records custodian, and the custodian has the burden to establish the applicability of an exception. A custodian does not meet this burden if it has not proven that the requested records fall squarely within the exception.” *State ex rel. Cincinnati Enquirer v. Jones-Kelley*, 118 Ohio St.3d 81, 2008-Ohio-1770, 886 N.E.2d 206, paragraph two of the syllabus.

{¶ 7} Respondent asserts that the records at issue, the attorney fee statements and billings, are exempt from disclosure under R.C. 149.43 because they are protected by the attorney-client privilege and work product doctrine. In order to properly examine the issues before us, we ordered respondent to submit the unredacted copies of the records to the court for an in camera inspection. Respondent filed those records on March 16, 2012.

{¶ 8} R.C. 149.43(A)(1)(v) exempts from disclosure “[r]ecords the release of which is prohibited by state or federal law.” In *State ex rel. Dawson v. Bloom-Carroll Local School Dist.*, 131 Ohio St.3d 10, 2011-Ohio-6009, 959 N.E.2d 524, ¶ 27, the Supreme Court of Ohio clarified this exemption as it relates to the attorney-client privilege:

“The attorney-client privilege, which covers records of communications between attorneys and their government clients pertaining to the attorneys’ legal advice, is a state law prohibiting release of those records.” *State ex rel. Besser v. Ohio State Univ.* (2000), 87 Ohio St.3d 535, 542, 2000-Ohio-475, 721 N.E.2d 1044. In Ohio, the attorney-client privilege is governed both by statute, R.C. 2317.02(A), which provides a testimonial privilege, and by common law, which broadly protects against any dissemination of information obtained in the confidential attorney-client relationship. *State ex rel. Toledo Blade Co. v. Toledo-Lucas Cty. Port Auth.*, 121 Ohio St.3d 537, 2009-Ohio-1767, 905 N.E.2d 1221, ¶ 24.

{¶ 9} In *Dawson*, the relator, Dawson, had filed a petition for a writ of mandamus to compel the respondent, the school district, to provide her with access to itemized invoices of law firms who had provided legal services to the school district pertaining to Dawson and her children. Prior to filing her petition with the Supreme Court, Dawson had filed a public records request with the school district. While the school district provided Dawson with summaries of invoices which noted the attorney’s name, the invoice total and the matter involved, the school district refused to provide Dawson with the itemized invoices themselves. The school district asserted that the invoices contained confidential communications between the district and its attorneys and were therefore exempt from disclosure. The Supreme Court agreed and held that “[t]o the extent that narrative portions of attorney-fee statements are ‘descriptions of legal services performed

by counsel for a client,' they are protected by the attorney-client privilege because they 'represent communications from the attorney to the client about matters for which the attorney has been retained by the client.'" *Dawson, supra*, at ¶ 28, quoting *State ex rel. Alley v. Couchois*, 2d Dist. No. 94-CA-30, 1995 WL 559973, * 4 (Sept. 20, 1995). In reaching this conclusion, the court noted:

"While a simple invoice ordinarily is not privileged, itemized legal bills necessarily reveal confidential information and thus fall within the [attorney-client] privilege." *Hewes v. Langston* (Miss.2003), 853 So.2d 1237, ¶ 45. As a federal appellate court observed, "billing records describing the services performed for [the attorney's] clients and the time spent on those services, and any other attorney-client correspondence * * * may reveal the client's motivation for seeking legal representation, the nature of the services provided or contemplated, strategies to be employed in the event of litigation, and other confidential information exchanged during the course of the representation. * * * [A] demand for such documents constitutes 'an unjustified intrusion into the attorney-client relationship.'" *In re Horn* (C.A.9, 1992), 976 F.2d 1314, 1317-1318, quoting *In re Grand Jury Witness (Salas)* (C.A.9, 1982), 695 F.2d 359, 362.

{¶ 10} The court further held, however, that the school district properly responded to Dawson's request for the itemized invoices of law firms by providing her with summaries of the invoices, which included the attorney's name, the fee total, and the

general matter involved. Accordingly, that information does fall within the realm of matters that are subject to disclosure under the Public Records Act.

{¶ 11} In the case before us, the attorney fee statements and billings which respondent has submitted to us for an in camera inspection contain narrative descriptions of legal services performed by counsel for the city of Vermilion. The invoices submitted to the city by Marcie & Butler state the date, a description of the professional service rendered, the time spent on each service and the hourly rate, and the total amount due for each date listed. The invoices submitted to the city by Stumphauzer & O'Toole state under separate headings which identify the general matter or case involved, detailed descriptions of the professional services rendered, the time spent on those services and the legal fees associated with each matter. Consistent with *Dawson*, we must hold that the subject itemized billing records are protected by the attorney-client privilege and are therefore exempt from disclosure under the Public Records Act.

{¶ 12} Although as a general matter R.C. 149.43(A) "envisions an opportunity on the part of the public office to examine records prior to inspection in order to make appropriate redactions of exempt materials," *State ex rel. The Warren Newspapers, Inc. v. Hutson*, 70 Ohio St.3d 619, 623, 640 N.E.2d 174 (1994), the court in *Dawson* did not discuss redaction but, rather, exempted the entire record. We further note that while the respondent in *Dawson* provided the relator with summaries of the invoices at issue, it is well established that a public office is not required to generate a new document in

response to a public records request. *State ex rel. Nix v. Cleveland*, 83 Ohio St.3d 379, 382; 700 N.E.2d 12 (1998).

{¶ 13} Because the itemized billing statements for attorney services rendered to the city of Vermilion by Kenneth Stumphauzer, Stumphauzer & O'Toole, and Marcie & Butler are exempt from disclosure under the Public Records Act, there remains no genuine issue of material fact and respondent is entitled to judgment as a matter of law. Relator's motion for summary judgment is denied. Relator's action in mandamus is hereby ordered dismissed at relator's cost. The clerk is directed to serve all parties, within three days, a copy of this decision in a manner prescribed by Civ.R. 5(B).

WRIT DISMISSED.

Peter M. Handwork, J.

Mark L. Pietrykowski, J.

Thomas J. Osowik, J.

CONCUR.

Robert M. Handwork
JUDGE
Mark L. Pietrykowski
JUDGE
Thomas J. Osowik
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

I HEREBY CERTIFY THIS TO BE A TRUE COPY OF THE ORIGINAL FILED IN THIS OFFICE.

LUVADA S. WILSON, CLERK OF COURTS
Erie County, Ohio

By *Betty A. Martin*

Baldwin's Ohio Revised Code Annotated
Title I. State Government
Chapter 149. Documents, Reports, and Records (Refs & Annos)
Miscellaneous Provisions

R.C. § 149.011

149.011 Definitions

Effective: February 18, 2011

Currentness

As used in this chapter, except as otherwise provided:

(A) "Public office" includes any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government. "Public office" does not include the nonprofit corporation formed under section 187.01 of the Revised Code.

(B) "State agency" includes every department, bureau, board, commission, office, or other organized body established by the constitution and laws of this state for the exercise of any function of state government, including any state-supported institution of higher education, the general assembly, any legislative agency, any court or judicial agency, or any political subdivision or agency of a political subdivision. "State agency" does not include the nonprofit corporation formed under section 187.01 of the Revised Code.

(C) "Public money" includes all money received or collected by or due a public official, whether in accordance with or under authority of any law, ordinance, resolution, or order, under color of office, or otherwise. It also includes any money collected by any individual on behalf of a public office or as a purported representative or agent of the public office.

(D) "Public official" includes all officers, employees, or duly authorized representatives or agents of a public office.

(E) "Color of office" includes any act purported or alleged to be done under any law, ordinance, resolution, order, or other pretension to official right, power, or authority.

(F) "Archive" includes any public record that is transferred to the state archives or other designated archival institutions because of the historical information contained on it.

(G) "Records" includes any document, device, or item, regardless of physical form or characteristic, including an electronic record as defined in section 1306.01 of the Revised Code, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.

Credits

(2011 H 1, eff. 2-18-11; 2006 H 9, eff. 9-29-07; 2003 H 95, eff. 9-26-03; 1985 H 238, eff. 7-1-85)

Relevant Notes of Decisions (5)

View all 65

Notes of Decisions listed below contain your search terms.

Public office

A private nonprofit corporation that acts as a major gift-receiving and soliciting arm of a public university and receives support from public taxation is a "public office" under RC 149.011(A), and is subject to the public records disclosure requirements of RC 149.43. State ex rel. Toledo Blade Co. v. Univ. of Toledo Found. (Ohio 1992) 65 Ohio St.3d 258, 602 N.E.2d 1159.

A public general hospital, rendering public service to residents, which is supported by public taxation is a public office whose records are subject to disclosure for purposes of RC 149.011(A), despite the fact that the custodian of such records is a private nonprofit corporation. State ex rel. Fostoria Daily Review Co. v. Fostoria Hosp. Ass'n (Ohio 1988) 40 Ohio St.3d 10, 531 N.E.2d 313.

A PASSPORT administrative agency that is operated by a private not-for-profit agency pursuant to OAC 5101:3-31-03(A)(1) is a "public office" as defined at RC 149.011(A) for purposes of the public records law and a "public body" as defined at RC 121.22 for purposes of the open meetings law. OAG 95-001.

A judicial determination that a particular entity is a public office under RC 149.011(A) for purposes of the public records law is not determinative of whether that entity is a public office under RC 117.01(D) for purposes of audit and regulation by the auditor of state under RC Ch 117. OAG 89-055.

Public records

Release of information not considered a document, device, or item as defined by RC 149.011 is not subject to disclosure under RC 149.43. State, ex rel. Fant v. Mengel (Ohio 1992) 62 Ohio St.3d 455, 584 N.E.2d 664.

R.C. § 149.011, OH ST § 149.011

Current through all 2011 laws and statewide issues and 2012 Files 70 through 126 of the 129th GA (2011-2012). End of Document

© 2012 Thomson Reuters. No claim to original U.S. Government Works.

Baldwin's Ohio Revised Code Annotated
Title I. State Government
Chapter 149. Documents, Reports, and Records (Refs & Annos)
Records Commissions

R.C. § 149.43

149.43 Availability of public records; mandamus action; training of public employees; public records policy;
bulk commercial special extraction requests

Effective: October 17, 2011

Currentness

(A) As used in this section:

(1) "Public record" means records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in this state kept by the nonprofit or for-profit entity operating the alternative school pursuant to section 3313.533 of the Revised Code. "Public record" does not mean any of the following:

(a) Medical records;

(b) Records pertaining to probation and parole proceedings or to proceedings related to the imposition of community control sanctions and post-release control sanctions;

(c) Records pertaining to actions under section 2151.85 and division (C) of section 2919.121 of the Revised Code and to appeals of actions arising under those sections;

(d) Records pertaining to adoption proceedings, including the contents of an adoption file maintained by the department of health under section 3705.12 of the Revised Code;

(e) Information in a record contained in the putative father registry established by section 3107.062 of the Revised Code, regardless of whether the information is held by the department of job and family services or, pursuant to section 3111.69 of the Revised Code, the office of child support in the department or a child support enforcement agency;

(f) Records listed in division (A) of section 3107.42 of the Revised Code or specified in division (A) of section 3107.52 of the Revised Code;

(g) Trial preparation records;

(h) Confidential law enforcement investigatory records;

- (i) Records containing information that is confidential under section 2710.03 or 4112.05 of the Revised Code;
- (j) DNA records stored in the DNA database pursuant to section 109.573 of the Revised Code;
- (k) Inmate records released by the department of rehabilitation and correction to the department of youth services or a court of record pursuant to division (E) of section 5120.21 of the Revised Code;
- (l) Records maintained by the department of youth services pertaining to children in its custody released by the department of youth services to the department of rehabilitation and correction pursuant to section 5139.05 of the Revised Code;
- (m) Intellectual property records;
- (n) Donor profile records;
- (o) Records maintained by the department of job and family services pursuant to section 3121.894 of the Revised Code;
- (p) Peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation residential and familial information;
- (q) In the case of a county hospital operated pursuant to Chapter 339. of the Revised Code or a municipal hospital operated pursuant to Chapter 749. of the Revised Code, information that constitutes a trade secret, as defined in section 1333.61 of the Revised Code;
- (r) Information pertaining to the recreational activities of a person under the age of eighteen;
- (s) Records provided to, statements made by review board members during meetings of, and all work products of a child fatality review board acting under sections 307.621 to 307.629 of the Revised Code, and child fatality review data submitted by the child fatality review board to the department of health or a national child death review database, other than the report prepared pursuant to division (A) of section 307.626 of the Revised Code;
- (t) Records provided to and statements made by the executive director of a public children services agency or a prosecuting attorney acting pursuant to section 5153.171 of the Revised Code other than the information released under that section;
- (u) Test materials, examinations, or evaluation tools used in an examination for licensure as a nursing home administrator that the board of examiners of nursing home administrators administers under section 4751.04 of the Revised Code or contracts under that section with a private or government entity to administer;
- (v) Records the release of which is prohibited by state or federal law;
- (w) Proprietary information of or relating to any person that is submitted to or compiled by the Ohio venture capital authority created under section 150.01 of the Revised Code;

- (x) Information reported and evaluations conducted pursuant to section 3701.072 of the Revised Code;
- (y) Financial statements and data any person submits for any purpose to the Ohio housing finance agency or the controlling board in connection with applying for, receiving, or accounting for financial assistance from the agency, and information that identifies any individual who benefits directly or indirectly from financial assistance from the agency;
- (z) Records listed in section 5101.29 of the Revised Code;
- (aa) Discharges recorded with a county recorder under section 317.24 of the Revised Code, as specified in division (B)(2) of that section;
- (bb) Usage information including names and addresses of specific residential and commercial customers of a municipally owned or operated public utility.
- (2) "Confidential law enforcement investigatory record" means any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to the extent that the release of the record would create a high probability of disclosure of any of the following:
 - (a) The identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised;
 - (b) Information provided by an information source or witness to whom confidentiality has been reasonably promised, which information would reasonably tend to disclose the source's or witness's identity;
 - (c) Specific confidential investigatory techniques or procedures or specific investigatory work product;
 - (d) Information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source.
- (3) "Medical record" means any document or combination of documents, except births, deaths, and the fact of admission to or discharge from a hospital, that pertains to the medical history, diagnosis, prognosis, or medical condition of a patient and that is generated and maintained in the process of medical treatment.
- (4) "Trial preparation record" means any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding, including the independent thought processes and personal trial preparation of an attorney.
- (5) "Intellectual property record" means a record, other than a financial or administrative record, that is produced or collected by or for faculty or staff of a state institution of higher learning in the conduct of or as a result of study or research on an educational, commercial, scientific, artistic, technical, or scholarly issue, regardless of whether the study or research was sponsored by the institution alone or in conjunction with a governmental body or private concern, and that has not been publicly released, published, or patented.

(6) "Donor profile record" means all records about donors or potential donors to a public institution of higher education except the names and reported addresses of the actual donors and the date, amount, and conditions of the actual donation.

(7) "Peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation residential and familial information" means any information that discloses any of the following about a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation:

(a) The address of the actual personal residence of a peace officer, parole officer, probation officer, bailiff, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or an investigator of the bureau of criminal identification and investigation, except for the state or political subdivision in which the peace officer, parole officer, probation officer, bailiff, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation resides;

(b) Information compiled from referral to or participation in an employee assistance program;

(c) The social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of, or any medical information pertaining to, a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation;

(d) The name of any beneficiary of employment benefits, including, but not limited to, life insurance benefits, provided to a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation by the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's employer;

(e) The identity and amount of any charitable or employment benefit deduction made by the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's employer from the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's compensation unless the amount of the deduction is required by state or federal law;

(f) The name, the residential address, the name of the employer, the address of the employer, the social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of the spouse, a former spouse, or any child of a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation;

(g) A photograph of a peace officer who holds a position or has an assignment that may include undercover or plain clothes positions or assignments as determined by the peace officer's appointing authority.

As used in divisions (A)(7) and (B)(9) of this section, "peace officer" has the same meaning as in section 109.71 of the Revised Code and also includes the superintendent and troopers of the state highway patrol; it does not include the sheriff of a county or a supervisory employee who, in the absence of the sheriff, is authorized to stand in for, exercise the authority of, and perform the duties of the sheriff.

As used in divisions (A)(7) and (B)(5)2 of this section, "correctional employee" means any employee of the department of rehabilitation and correction who in the course of performing the employee's job duties has or has had contact with inmates and persons under supervision.

As used in divisions (A)(7) and (B)(5)3 of this section, "youth services employee" means any employee of the department of youth services who in the course of performing the employee's job duties has or has had contact with children committed to the custody of the department of youth services.

As used in divisions (A)(7) and (B)(9) of this section, "firefighter" means any regular, paid or volunteer, member of a lawfully constituted fire department of a municipal corporation, township, fire district, or village.

As used in divisions (A)(7) and (B)(9) of this section, "EMT" means EMTs-basic, EMTs-I, and paramedics that provide emergency medical services for a public emergency medical service organization. "Emergency medical service organization," "EMT-basic," "EMT-I," and "paramedic" have the same meanings as in section 4765.01 of the Revised Code.

As used in divisions (A)(7) and (B)(9) of this section, "investigator of the bureau of criminal identification and investigation" has the meaning defined in section 2903.11 of the Revised Code.

(8) "Information pertaining to the recreational activities of a person under the age of eighteen" means information that is kept in the ordinary course of business by a public office, that pertains to the recreational activities of a person under the age of eighteen years, and that discloses any of the following:

(a) The address or telephone number of a person under the age of eighteen or the address or telephone number of that person's parent, guardian, custodian, or emergency contact person;

(b) The social security number, birth date, or photographic image of a person under the age of eighteen;

(c) Any medical record, history, or information pertaining to a person under the age of eighteen;

(d) Any additional information sought or required about a person under the age of eighteen for the purpose of allowing that person to participate in any recreational activity conducted or sponsored by a public office or to use or obtain admission privileges to any recreational facility owned or operated by a public office.

(9) "Community control sanction" has the same meaning as in section 2929.01 of the Revised Code.

(10) "Post-release control sanction" has the same meaning as in section 2967.01 of the Revised Code.

(11) "Redaction" means obscuring or deleting any information that is exempt from the duty to permit public inspection or

copying from an item that otherwise meets the definition of a "record" in section 149.011 of the Revised Code.

(12) "Designee" and "elected official" have the same meanings as in section 109.43 of the Revised Code.

(B)(1) Upon request and subject to division (B)(8) of this section, all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Subject to division (B)(8) of this section, upon request, a public office or person responsible for public records shall make copies of the requested public record available at cost and within a reasonable period of time. If a public record contains information that is exempt from the duty to permit public inspection or to copy the public record, the public office or the person responsible for the public record shall make available all of the information within the public record that is not exempt. When making that public record available for public inspection or copying that public record, the public office or the person responsible for the public record shall notify the requester of any redaction or make the redaction plainly visible. A redaction shall be deemed a denial of a request to inspect or copy the redacted information, except if federal or state law authorizes or requires a public office to make the redaction.

(2) To facilitate broader access to public records, a public office or the person responsible for public records shall organize and maintain public records in a manner that they can be made available for inspection or copying in accordance with division (B) of this section. A public office also shall have available a copy of its current records retention schedule at a location readily available to the public. If a requester makes an ambiguous or overly broad request or has difficulty in making a request for copies or inspection of public records under this section such that the public office or the person responsible for the requested public record cannot reasonably identify what public records are being requested, the public office or the person responsible for the requested public record may deny the request but shall provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course of the public office's or person's duties.

(3) If a request is ultimately denied, in part or in whole, the public office or the person responsible for the requested public record shall provide the requester with an explanation, including legal authority, setting forth why the request was denied. If the initial request was provided in writing, the explanation also shall be provided to the requester in writing. The explanation shall not preclude the public office or the person responsible for the requested public record from relying upon additional reasons or legal authority in defending an action commenced under division (C) of this section.

(4) Unless specifically required or authorized by state or federal law or in accordance with division (B) of this section, no public office or person responsible for public records may limit or condition the availability of public records by requiring disclosure of the requester's identity or the intended use of the requested public record. Any requirement that the requester disclose the requester's identity or the intended use of the requested public record constitutes a denial of the request.

(5) A public office or person responsible for public records may ask a requester to make the request in writing, may ask for the requester's identity, and may inquire about the intended use of the information requested, but may do so only after disclosing to the requester that a written request is not mandatory and that the requester may decline to reveal the requester's identity or the intended use and when a written request or disclosure of the identity or intended use would benefit the requester by enhancing the ability of the public office or person responsible for public records to identify, locate, or deliver the public records sought by the requester.

(6) If any person chooses to obtain a copy of a public record in accordance with division (B) of this section, the public office or person responsible for the public record may require that person to pay in advance the cost involved in providing the copy of the public record in accordance with the choice made by the person seeking the copy under this division. The public office or the person responsible for the public record shall permit that person to choose to have the public record duplicated upon paper, upon the same medium upon which the public office or person responsible for the public record keeps it, or upon any

other medium upon which the public office or person responsible for the public record determines that it reasonably can be duplicated as an integral part of the normal operations of the public office or person responsible for the public record. When the person seeking the copy makes a choice under this division, the public office or person responsible for the public record shall provide a copy of it in accordance with the choice made by the person seeking the copy. Nothing in this section requires a public office or person responsible for the public record to allow the person seeking a copy of the public record to make the copies of the public record.

(7) Upon a request made in accordance with division (B) of this section and subject to division (B)(6) of this section, a public office or person responsible for public records shall transmit a copy of a public record to any person by United States mail or by any other means of delivery or transmission within a reasonable period of time after receiving the request for the copy. The public office or person responsible for the public record may require the person making the request to pay in advance the cost of postage if the copy is transmitted by United States mail or the cost of delivery if the copy is transmitted other than by United States mail, and to pay in advance the costs incurred for other supplies used in the mailing, delivery, or transmission.

Any public office may adopt a policy and procedures that it will follow in transmitting, within a reasonable period of time after receiving a request, copies of public records by United States mail or by any other means of delivery or transmission pursuant to this division. A public office that adopts a policy and procedures under this division shall comply with them in performing its duties under this division.

In any policy and procedures adopted under this division, a public office may limit the number of records requested by a person that the office will transmit by United States mail to ten per month, unless the person certifies to the office in writing that the person does not intend to use or forward the requested records, or the information contained in them, for commercial purposes. For purposes of this division, "commercial" shall be narrowly construed and does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.

(8) A public office or person responsible for public records is not required to permit a person who is incarcerated pursuant to a criminal conviction or a juvenile adjudication to inspect or to obtain a copy of any public record concerning a criminal investigation or prosecution or concerning what would be a criminal investigation or prosecution if the subject of the investigation or prosecution were an adult, unless the request to inspect or to obtain a copy of the record is for the purpose of acquiring information that is subject to release as a public record under this section and the judge who imposed the sentence or made the adjudication with respect to the person, or the judge's successor in office, finds that the information sought in the public record is necessary to support what appears to be a justiciable claim of the person.

(9)(a) Upon written request made and signed by a journalist on or after December 16, 1999, a public office, or person responsible for public records, having custody of the records of the agency employing a specified peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation shall disclose to the journalist the address of the actual personal residence of the peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation and, if the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's spouse, former spouse, or child is employed by a public office, the name and address of the employer of the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's spouse, former spouse, or child. The request shall include the journalist's name and title and the name and address of the journalist's employer and shall state that disclosure of the information sought would be in the public interest.

(b) Division (B)(9)(a) of this section also applies to journalist requests for customer information maintained by a municipally owned or operated public utility, other than social security numbers and any private financial information such as credit reports, payment methods, credit card numbers, and bank account information.

(c) As used in division (B)(9) of this section, "journalist" means a person engaged in, connected with, or employed by any news medium, including a newspaper, magazine, press association, news agency, or wire service, a radio or television station, or a similar medium, for the purpose of gathering, processing, transmitting, compiling, editing, or disseminating information for the general public.

(C)(1) If a person allegedly is aggrieved by the failure of a public office or the person responsible for public records to promptly prepare a public record and to make it available to the person for inspection in accordance with division (B) of this section or by any other failure of a public office or the person responsible for public records to comply with an obligation in accordance with division (B) of this section, the person allegedly aggrieved may commence a mandamus action to obtain a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, that awards court costs and reasonable attorney's fees to the person that instituted the mandamus action, and, if applicable, that includes an order fixing statutory damages under division (C)(1) of this section. The mandamus action may be commenced in the court of common pleas of the county in which division (B) of this section allegedly was not complied with, in the supreme court pursuant to its original jurisdiction under Section 2 of Article IV, Ohio Constitution, or in the court of appeals for the appellate district in which division (B) of this section allegedly was not complied with pursuant to its original jurisdiction under Section 3 of Article IV, Ohio Constitution.

If a requestor transmits a written request by hand delivery or certified mail to inspect or receive copies of any public record in a manner that fairly describes the public record or class of public records to the public office or person responsible for the requested public records, except as otherwise provided in this section, the requestor shall be entitled to recover the amount of statutory damages set forth in this division if a court determines that the public office or the person responsible for public records failed to comply with an obligation in accordance with division (B) of this section.

The amount of statutory damages shall be fixed at one hundred dollars for each business day during which the public office or person responsible for the requested public records failed to comply with an obligation in accordance with division (B) of this section, beginning with the day on which the requester files a mandamus action to recover statutory damages, up to a maximum of one thousand dollars. The award of statutory damages shall not be construed as a penalty, but as compensation for injury arising from lost use of the requested information. The existence of this injury shall be conclusively presumed. The award of statutory damages shall be in addition to all other remedies authorized by this section.

The court may reduce an award of statutory damages or not award statutory damages if the court determines both of the following:

(a) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(b) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(2)(a) If the court issues a writ of mandamus that orders the public office or the person responsible for the public record to comply with division (B) of this section and determines that the circumstances described in division (C)(1) of this section exist, the court shall determine and award to the relator all court costs.

(b) If the court renders a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, the court may award reasonable attorney's fees subject to reduction as described in division (C)(2)(c) of this section. The court shall award reasonable attorney's fees, subject to reduction as described in division (C)(2)(c) of this section when either of the following applies:

(i) The public office or the person responsible for the public records failed to respond affirmatively or negatively to the public records request in accordance with the time allowed under division (B) of this section.

(ii) The public office or the person responsible for the public records promised to permit the relator to inspect or receive copies of the public records requested within a specified period of time but failed to fulfill that promise within that specified period of time.

(c) Court costs and reasonable attorney's fees awarded under this section shall be construed as remedial and not punitive. Reasonable attorney's fees shall include reasonable fees incurred to produce proof of the reasonableness and amount of the fees and to otherwise litigate entitlement to the fees. The court may reduce an award of attorney's fees to the relator or not award attorney's fees to the relator if the court determines both of the following:

(i) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(ii) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records as described in division (C)(2)(c)(i) of this section would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(D) Chapter 1347. of the Revised Code does not limit the provisions of this section.

(E)(1) To ensure that all employees of public offices are appropriately educated about a public office's obligations under division (B) of this section, all elected officials or their appropriate designees shall attend training approved by the attorney general as provided in section 109.43 of the Revised Code. In addition, all public offices shall adopt a public records policy in compliance with this section for responding to public records requests. In adopting a public records policy under this division, a public office may obtain guidance from the model public records policy developed and provided to the public office by the attorney general under section 109.43 of the Revised Code. Except as otherwise provided in this section, the policy may not limit the number of public records that the public office will make available to a single person, may not limit the number of public records that it will make available during a fixed period of time, and may not establish a fixed period of time before it will respond to a request for inspection or copying of public records, unless that period is less than eight hours.

(2) The public office shall distribute the public records policy adopted by the public office under division (E)(1) of this

section to the employee of the public office who is the records custodian or records manager or otherwise has custody of the records of that office. The public office shall require that employee to acknowledge receipt of the copy of the public records policy. The public office shall create a poster that describes its public records policy and shall post the poster in a conspicuous place in the public office and in all locations where the public office has branch offices. The public office may post its public records policy on the internet web site of the public office if the public office maintains an internet web site. A public office that has established a manual or handbook of its general policies and procedures for all employees of the public office shall include the public records policy of the public office in the manual or handbook.

(F)(1) The bureau of motor vehicles may adopt rules pursuant to Chapter 119. of the Revised Code to reasonably limit the number of bulk commercial special extraction requests made by a person for the same records or for updated records during a calendar year. The rules may include provisions for charges to be made for bulk commercial special extraction requests for the actual cost of the bureau, plus special extraction costs, plus ten per cent. The bureau may charge for expenses for redacting information, the release of which is prohibited by law.

(2) As used in division (F)(1) of this section:

(a) "Actual cost" means the cost of depleted supplies, records storage media costs, actual mailing and alternative delivery costs, or other transmitting costs, and any direct equipment operating and maintenance costs, including actual costs paid to private contractors for copying services.

(b) "Bulk commercial special extraction request" means a request for copies of a record for information in a format other than the format already available, or information that cannot be extracted without examination of all items in a records series, class of records, or data base by a person who intends to use or forward the copies for surveys, marketing, solicitation, or resale for commercial purposes. "Bulk commercial special extraction request" does not include a request by a person who gives assurance to the bureau that the person making the request does not intend to use or forward the requested copies for surveys, marketing, solicitation, or resale for commercial purposes.

(c) "Commercial" means profit-seeking production, buying, or selling of any good, service, or other product.

(d) "Special extraction costs" means the cost of the time spent by the lowest paid employee competent to perform the task, the actual amount paid to outside private contractors employed by the bureau, or the actual cost incurred to create computer programs to make the special extraction. "Special extraction costs" include any charges paid to a public agency for computer or records services.

(3) For purposes of divisions (F)(1) and (2) of this section, "surveys, marketing, solicitation, or resale for commercial purposes" shall be narrowly construed and does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.

Credits

(2011 H 64, eff. 10-17-11; 2011 H 153, eff. 9-29-11; 2009 H 1, eff. 10-16-09; 2008 S 248, eff. 4-7-09; 2008 H 214, eff. 5-14-08; 2006 H 9, eff. 9-29-07; 2006 H 141, eff. 3-30-07; 2004 H 303, eff. 10-29-05; 2004 H 431, eff. 7-1-05; 2004 S 222, eff. 4-27-05; 2003 H 6, eff. 2-12-04; 2002 S 258, eff. 4-9-03; 2002 H 490, eff. 1-1-04; 2002 S 180, eff. 4-9-03; 2001 H 196, eff. 11-20-01; 2000 S 180, eff. 3-22-01; 2000 H 448, eff. 10-5-00; 2000 H 640, eff. 9-14-00; 2000 H 539, eff. 6-21-00; 1999 H 471, eff. 7-1-00; 1999 S 78, eff. 12-16-99; 1999 S 55, eff. 10-26-99; 1998 H 421, eff. 5-6-98; 1997 H 352, eff. 1-1-98; 1996 S 277, § 6, eff. 7-1-97; 1996 S 277, § 1, eff. 3-31-97; 1996 H 438, eff. 7-1-97; 1996 S 269, eff. 7-1-96; 1996 H 353, eff. 9-17-96; 1996 H 419, eff. 9-18-96; 1995 H 5, eff. 8-30-95; 1993 H 152, eff. 7-1-93; 1987 S 275; 1985 H 319, H 238; 1984 H 84; 1979